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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1063

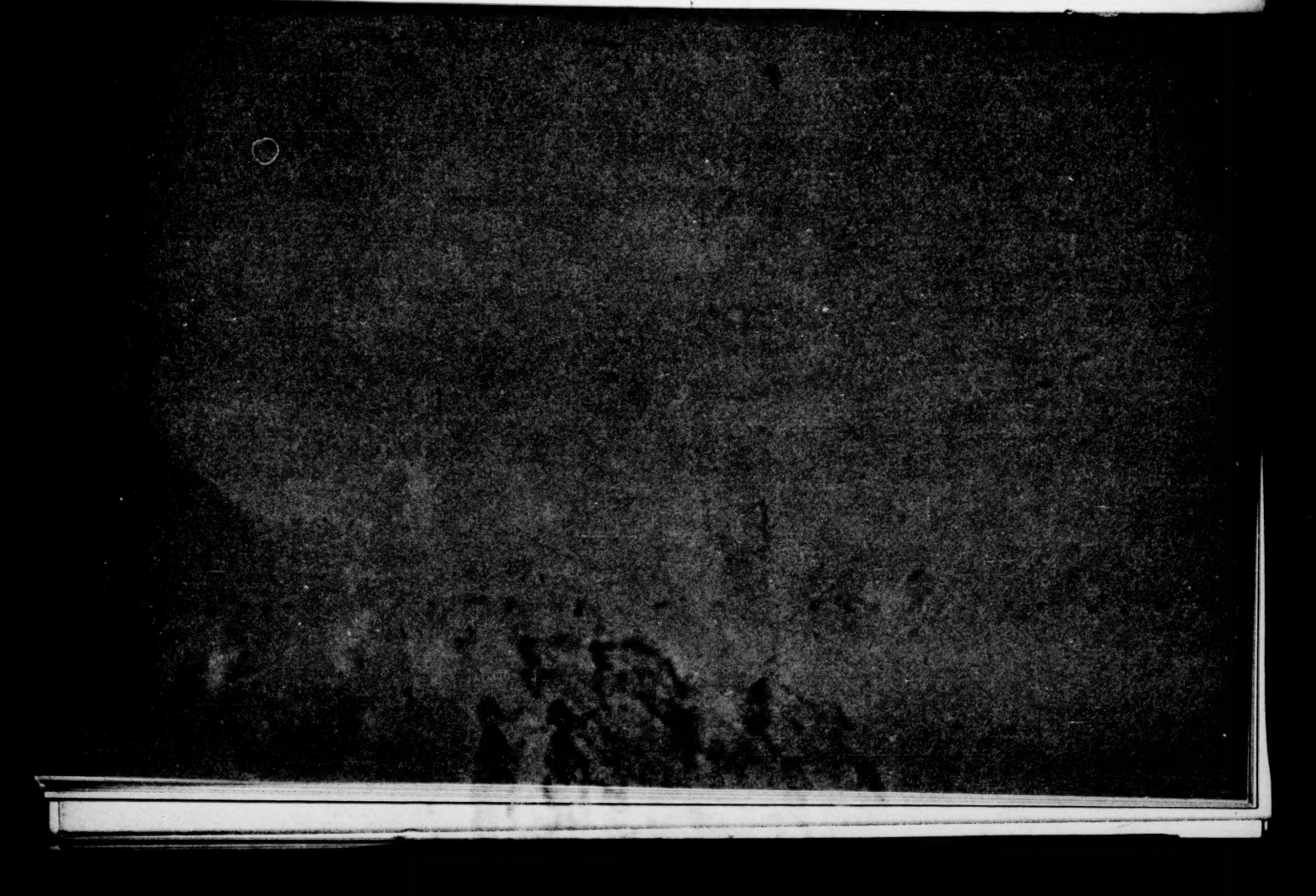
WILLIAM HARTOG, PLAINTIFF IN ERROR,

vs.

HENRY MEMORY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

FILED Oct. 12th 1883.



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BOND.

UNITED STATES OF AMERICA, } ss.
NORTHERN DISTRICT OF ILLINOIS. }

CIRCUIT COURT, OCTOBER TERM, A. D. 1884.

Wm. Hartog, } *In Assumpsit.*
vs.
Henry Memory. }

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against said plaintiff.

Dated this 19th day of September, A. D. 1884.

A. M. PENCE.

Endorsed: Filed September 19, A. D. 1884.
WM. H. BRADLEY, *Clerk.*

On the same day, to wit: on the nineteenth day of September, 1884, there issued out of said clerk's office a writ of summons in said entitled cause, which said writ together with the return of the marshal thereto attached is in the words and figures following, to wit:

SUMMONS.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss.
NORTHERN DISTRICT OF ILLINOIS. }

THE UNITED STATES OF AMERICA.

To the Marshal of the Northern District of Illinois—Greeting:

We command you to summon Henry Memory if found in your district, to be and appear before our judges of our Circuit court of the United States for the Northern district of Illinois, on the first day of the next term thereof, to be holden in Chicago, in the district aforesaid, on the first Monday of October next, to answer unto William Hartog of a plea of trespass on the case upon promises, to his damage, as it is alleged of five thousand dollars, and have you then and there this writ.

[SEAL.] Witness the Hon. Morris R. Waite, Chief Justice of the Supreme court of the United States of America, at Chicago, aforesaid, this 19th day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 109th year.

WM. H. BRADLEY, *Clerk.*

SPECIAL DEPUTY'S RETURN.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

Know all men by these presents, that I have appointed and by these presents do appoint John J. Douglas, my true and lawful deputy, to execute the annexed writ, *William Hartog* v. *Henry Memory*, and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit: by reading the same to and in the presence and the hearing of Henry Memory, therein named, on the 19th day of September, A. D. 1884.

A. M. JONES, *United States Marshal.*
By J. J. DOUGLAS, *Special Deputy.*

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

John J. Douglas, being duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

J. J. DOUGLAS.

Subscribed and sworn to before me this 23d day of September, A. D. 1884.
[SEAL.]
SAMUEL C. HAYES,
Notary Public.

Endorsed: Filed October 6, A. D. 1884.
WM. H. BRADLEY, *Clerk.*

Afterwards, to wit: On the 26th day of September, 1884, came the plaintiff, by his attorneys, and filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. }

CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

William Hartog, who is a citizen of the kingdom of Holland, doing business under the name and style of Hartog & Fesel, at Rot-

terdam, Holland, plaintiff in this suit, by Rosenthal & Pence, his attorneys, complains of Henry Memory, defendant, who is a citizen of the State of Illinois, and who has been summoned to answer the said plaintiff in a plea of trespass on the case on promises.

For that, whereas, to wit: on the sixth day of September in the year of our Lord one thousand eight hundred and seventy-nine (1879) at Rotterdam, Holland, to wit: at said district, said plaintiff by the name of Hartog & Fesel, at the request of the defendant, bargained with the defendant to buy of him, and the defendant then and there sold to the plaintiff a large quantity, to wit: one hundred cases long backs, a hog product, each long back to be of prime winter crop, to average from forty to forty-five pounds in weight, at the price of thirty-four and one quarter florins, according to the currency of the kingdom of Holland, per two hundred and twenty pounds, according to American weight, charges for freight thereof included, to be delivered to wit: in the month of December, 1879, and January, 1880, at Rotterdam, in the kingdom of Holland, and to be forwarded and carried from the United States, to wit: from Chicago, Illinois, in said Northern district, on through bills of lading and by direct steamer from New York to Rotterdam aforesaid, and said plaintiff also agreed with said defendant to pay defendant therefor through and by means of a draft drawn upon said plaintiff by said defendant, payable at sixty days sight upon presentation and delivery of the bills of lading for such shipments, and to be accepted by said plaintiff upon presentation and delivery of bills of lading, and in consideration there,of and that plaintiff had promised the defendant at his request to accept and receive said long backs or merchandise, and to pay him for the same at the price aforesaid in the manner aforesaid, he, the defendant, on the day first aforesaid promised the plaintiff to deliver the said long backs or merchandise aforesaid to them as aforesaid; and although the said time for said shipment and delivery of said long backs or merchandise has long since elapsed, and the said plaintiff has always been ready and willing to accept and receive the said long backs or merchandise, and to pay for the same at the price aforesaid, yet the defendant did not nor would not within the time aforesaid, or afterwards, deliver the said long backs or merchandise or any part thereof to the plaintiff at Rotterdam, Holland, to wit: at said district or elsewhere, but refused so to do; and said plaintiff avers that as to said cases referred to according to said contract or agreement the long backs or merchandise in each case should and would average to wit: five hundred pounds in weight; whereby the plaintiff has been deprived of divers great gains and profits which otherwise would have accrued to him from the delivery of the said long backs or merchandise to him as aforesaid.

And also for that, whereas, afterwards, to wit: on the twentieth day of September, in the year of our Lord one thousand eight hundred and seventy-nine (1879), at Rotterdam, Holland, to wit: at

said district, said plaintiff, by the name of Hartog & Fesel, at the request of the defendant, bargained with the defendant to buy of him, and the defendant then and there sold to the plaintiff a large quantity, to wit: fifty cases of dry salted hog meat, called short clear middles, six to eight pieces to a case, at the price of thirty-two and one-quarter florins, according to the currency of the kingdom of Holland, per 220 pounds, according to American weight, charges for freight thereon included, to be delivered at Rotterdam, in the kingdom of Holland, in the month of October, 1879, and to be forwarded and carried from the United States, to wit, from Chicago, Illinois, in said Northern district, on through bills of lading and by direct steamer from New York to Rotterdam aforesaid; and said plaintiff also agreed with said defendant to pay defendant therefor through and by means of a draft drawn upon said plaintiff by said defendant, payable upon sixty days' sight, upon presentation and delivery of the bills of lading for such shipment, and to be accepted by said plaintiff upon presentation and delivery of such bills of lading; and in consideration thereof, and that plaintiff had promised the defendant at his request to accept and receive such meat or merchandise and to pay him for the same at the price aforesaid, in the manner aforesaid, he, the defendant, on the day first aforesaid, promised the plaintiff to deliver the said meat or merchandise to him as aforesaid, and although the said time for said shipment and delivery of said meat or merchandise has long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said meat or merchandise and to pay for the same at the price aforesaid, yet the defendant did not or would not within the time aforesaid or afterwards, deliver the said meat or merchandise, or any part thereof to the plaintiff, at Rotterdam, Holland, to wit, at said district or elsewhere, but refused to do so, and said plaintiff avers that as to said cases referred to according to said contract or agreement the meat or merchandise in each case should and would average, to wit: five hundred pounds in weight; whereby the plaintiff has been deprived of divers great gains and profits, which otherwise would have accrued to him from the delivery of said meat or merchandise to him as aforesaid.

And also for that, whereas, afterwards, to wit: on the 20th day of September, in the year of our Lord 1879, at Rotterdam, Holland, to wit: at said district, the said plaintiff, by the name of Hartog Fesel, at the request of the defendant bargained with the defendant to buy of him, and the defendant then and there sold to the plaintiff a large quantity, to wit: fifty cases of dry salted hog meat, called short, clear, middles, six to eight pieces to a case, at the price of thirty-one and one-half florins, according to the currency of the kingdom of Holland, per two hundred and twenty pounds according to American weight, charges for freight thereon included, to be delivered at Rotterdam, in the kingdom of Holland, in the month of November, 1879, and to be forwarded and carried from the United

States, to wit: from Chicago, Illinois, in said Northern district, on through bills of lading, and by direct steamer from New York to Rotterdam aforesaid; and said plaintiff also agreed with said defendant to pay defendant therefor through and by means of a draft drawn upon said plaintiff by said defendant, payable upon sixty days sight, upon presentation and delivery of the bills of lading for such shipment, and to be accepted by said plaintiff upon presentation and delivery of such bills of lading, and in consideration thereof, and that plaintiff had promised the defendant at his request, to accept and receive such meat or merchandise, and to pay him for the same at the price aforesaid, in the manner aforesaid, he, the defendant, on the day first aforesaid promised the plaintiff to deliver such meat or merchandise aforesaid to him as aforesaid, and although the said time for said shipment and delivery of said meat or merchandise has long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said meat or merchandise, and to pay for the same at the price aforesaid, yet the defendant did not or would not, within the time aforesaid or afterwards, deliver the said meat or merchandise, or any part thereof, to the plaintiff, at Rotterdam, Holland, to wit: at said district or elsewhere, but refused to do so, and said plaintiff avers that as to said cases referred to, according to said contract or agreement, the meat or merchandise in each case should and would average, to wit: five hundred pounds in weight; whereby the plaintiff has been deprived of divers great gains and profits, which otherwise would have accrued to him from the delivery of said meat or merchandise to him as aforesaid:

And the plaintiff avers that a florin, according to the currency of Holland, is of the value of, to wit: forty cents according to the currency of the United States.

For that whereas, also the said defendant, heretofore, to wit: on the first day of July, in the year of our Lord one thousand eight hundred and eighty-four, at Rotterdam, Holland, to wit: at the district aforesaid, became and was indebted to the said plaintiff in the sum of five thousand dollars, of lawful money of the United States of America, for divers goods, wares and merchandise, by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant, and being so indebted to the said plaintiff the said defendant in consideration thereof, afterwards, to wit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit: on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant sold and delivered to the said defendant divers other goods, wares and merchandise of the said

plaintiff, the said defendant then and there undertook, and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiff avers that the said goods, wares and merchandise, last mentioned, at the time of the sale and delivery thereof were reasonably worth the further sum of five thousand dollars, of like lawful money as aforesaid, to wit: at the place aforesaid, whereof the said defendant afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said defendant, afterwards, to wit: on the same day and year, and at the place aforesaid, became and was indebted to the said plaintiff in the further sum of five thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant. And in the like sum for other money by the said plaintiff before that time paid, laid out and expended for the said defendant, and at the like request of the said defendant. And in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant. And being so indebted, the said defendant in consideration thereof, afterwards, to wit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant, afterwards, to wit: on the day and year last aforesaid, and at the place last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of five thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff the said defendant in consideration thereof afterwards, to wit: on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, etc.), has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff, of five thousand dollars, and therefore the said plaintiff brings suit, etc.

ROSENTHAL & PENCE,
Plaintiff's Attorneys.

COPY OF INSTRUMENT AND ACCOUNT SUED ON.

HENRY MEMORY, *Dr.*,
To HARTOG & FESEL.

To damages for non-delivery of 100 cases long backs, prime winter crop, containing 50,000 pounds, which should have been delivered December, 1879, and January, 1880	$2,000 00
To damages for non-delivery of 50 cases short clear middles, containing 25,000 pounds, which should have been delivered in October, 1879	1,500 00
To damages for non-delivery of 50 cases short clear middles, containing 25,000 pounds, which should have been delivered in November, 1879	1,500 00
	$5,000 00

HENRY MEMORY
To WILLIAM HARTOG, doing business as Hartog & Fesel.
Dr.

To goods, wares and merchandise sold and delivered	$ 5,000 00
To money lent and advanced	5,000 00
To money paid, laid out and expended	5,000 00
To money had and received to and for the use of said plaintiff	5,000 00
To money due for interest and forbearance	5,000 00
To labor services and material	5,000 00
To balance due on account stated	5,000 00

Endorsed: Filed Sept. 26, 1884.
WM. H. BRADLEY, *Clk.*

Afterwards, to wit: On the eighth day of October, 1884, came the defendant by his attorney and filed in said clerk's office his pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

PLEAS.

CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS.

October term, 1884.

William Hartog
vs.
Henry Memory. } *Asst.*

And the defendant by Austin Bierbower, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise in manner and form as the plaintiff has above thereof complained against him, and of this he puts himself upon the country, etc.

And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him this defendant, because he says that the several supposed causes of action in the said declaration mentioned did not, nor did any or either of them accrue to the plaintiff at any time within five years next before the commencement of this suit, in manner and form as the plaintiff has above complained against him, the defendant; and this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him, etc.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says that the several supposed causes of action in the said declaration accrued in the kingdom of Holland, and that by the laws of the said kingdom of Holland they are each and all barred by limitation.

AUSTIN BIERBOWER,
Attorney for Defendant.

Endorsed: Filed October 8, 1884.

WM. H. BRADLEY, *Clerk.*

Afterwards, to wit: On the eighth day of November, in the adjourned October term of said court, 1884, in the record of the proceedings thereof in said entitled cause before Henry W. Blodgett, district judge, is the following entry, to wit:

ORDER.

William Hartog
vs.
Henry Memory } *Assumpsit.*

Now come the parties by their attorneys, and on motion of the plaintiff by his attorney it is ordered that a dedimus potestatem or commission issue on Monday next to John F. Winter, United States

consul at the city of Rotterdam, in the kingdom of Holland, or to any United States vice consul or consular agent of the United States at said city of Rotterdam, to take the depositions of William Hartog, Emil Imhof and S. N. E. Flock, upon the direct interrogatories herein and the cross-interrogatories of the defendant, if filed, and which he is ruled to file by Monday morning next.

Afterwards, to wit: On the ninth day of May, 1885, came the plaintiff by his attorneys and filed in said clerk's office his replication in said entitled cause, which said replication is in the words and figures following, to wit:

REPLICATION.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.

CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS.

William Hartog
vs.
Henry Memory.

And now comes the said plaintiff and as to the plea of the defendant by him secondly above pleaded says that he, the plaintiff, by reason of anything in that plea alleged ought not to be barred from having his aforesaid action because he says that the said several causes of action and each and every of them did accrue to him within five years next before the commencement of this suit, in manner and form as he has above complained against the defendant, and this plaintiff prays may be inquired of by the country, etc.

ROSENTHAL & PENCE,
Plaintiff's Attorneys.

Endorsed: Filed May 9, 1885.

WM. H. BRADLEY, *Clerk.*

On the same day, to wit: On the ninth day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

ORDER.

William Hartog
vs.
Henry Memory.

Now come the parties by their attorneys, and on motion of the defendant by his attorney leave is given him to withdraw his third plea filed herein, which is done, and upon issues joined herein there-

upon come a jury of good and lawful men to wit: L. J. Cobb, W. F. Osgood, Eldred Thatcher, J. C. Fischer, J. M. Allen, John Stanley, F. H. Harris, W. L. Martin, Jesse Talcott, John R. Perrene, Jr., John Aynesby and James H. Stover, who were all duly elected, tried and sworn well and truly to try said issues, and after hearing the evidence and the arguments of counsel, and receiving the instructions of the court, the jury retired to consider of their verdict, and by agreement of the parties by their attorneys, the jury, when they shall have agreed upon a verdict, they may sign and seal the same and deliver to the officer in charge and meet the court Monday morning next.

Afterwards, to wit: on the eleventh day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause before Hon. ROMANZO BUNN, District Judge is the following entry, to wit:

ORDER.

William Hartog
vs.
Henry Memory. } *Assumpsit.*

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and the jury return their sealed verdict, wherein they say, we the jury find the issue for the plaintiff, and assess his damages at twenty-four hundred and ninety-seven dollars. And thereupon the defendant by his attorney moves the court for a new trial, and to dismiss this cause for want of jurisdiction.

Afterwards, to wit: on the tenth day of June, in the adjourned May term of said court, 1885, in the record of the proceedings thereof, in said entitled cause, before Hon. HENRY W. BLODGETT, District Judge, is the following entry, to wit:

The following order is entered by direction of the Hon. ROMANZO BUNN, Judge of the District court of the United States for the Western District of Wisconsin.

JUDGMENT.

William Hartog,
vs.
Henry Memory. } *Assumpsit.*

The court having considered, and being now fully advised upon the motion of the defendant for a new trial of this cause, and to dismiss the same for want of jurisdiction heretofore entered herein sustains said motion to dismiss, and orders that this cause be now dismissed for want of jurisdiction at the costs of the plaintiff.

It is thereupon considered and adjudged by the court that the defendant do have and recover of the plaintiff his costs in this behalf expended amounting to dollars and cents, and that he have execution therefor.

On the hearing of said cause the following exceptions were taken, and were allowed by the court and made of record, which said exceptions are in the words and figures following to wit:

BILL OF EXCEPTIONS.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } ss.

CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS.

William Hartog, }
vs.
Henry Memory. }

Be it remembered that on the 9th day of May, 1885, said cause came on to be heard before the Honorable ROMANZO BUNN, lawfully holding said court with a jury, and thereupon the plaintiff introduced evidence to sustain the issues on his behalf, which evidence also shows that said plaintiff was a subject of the king of Holland, and also shows that said defendant has been doing business in the city of Chicago, for several years.

And thereupon said defendant offered himself as a witness to maintain the issues on his behalf in said cause, and during the progress of his examination he was asked by his counsel the following questions, and gave the following answers:

Q. Are you a citizen of the United States, Mr. Memory?
A. No, sir.
Q. Of what dominion or kingdom are you a citizen?
A. I am a citizen of Great Britain, sir.

And thereupon said plaintiff, by his counsel, cross-examined said *Memory* as follows:

Q. How long have you resided and done business in Chicago?
A. About from eight to ten years, I suppose.
Q. Where did you do business before that?
A. I did business for a short time in New York.

It also appeared that defendant was in Holland twice in 1879, and that the alleged contract was entered into there.

Which was all the evidence introduced by either party on the question of citizenship or residence.

And thereupon said cause was submitted to the jury by the court, and the jury thereupon found a verdict for plaintiff, and assessed his damages, which verdict is in the words and figures following:

VERDICT.

We, the undersigned jury, find for the plaintiff, and assess the damages to the amount of twenty-four hundred and ninety-seven dollars.

JESSE TALCOTT, *foreman*,
J. CASPER FISCHER,
J. M. ALLEN,
JOHN AYNSBY,
FRANK H. HARRIS,
L. J. COBB,
E. THATCHER,
JOHN STANLEY,
JOHN R. PERRENE,
W. L. MARTIN,
J. H. STOVER,
W. F. OSGOOD.

And therenpon, and after the rendition of said verdict, the said defendant, by his counsel, moved the court to dismiss said cause for want of jurisdiction, which motion is in the words and figures following:

MOTION.

IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS.

MAY TERM, 1885.

William Hartog
vs. } *Assumpsit.*
Henry Memory.

And now comes the defendant, by his attorney, and it appearing that the defendant is not a citizen of the United States, or of any State, but a citizen and subject of Great Britain, and that all the parties to this suit are aliens, and that the court has no jurisdiction in this cause; the said defendant moves that this case be dismissed for want of jurisdiction in this court.

AUSTIN BIERBOWER,
Defendant's Attorney.

Endorsed: Filed June 1, 1885.
WM. H. BRADLEY, *Clerk.*

And thereupon, afterwards said court allowed said motion, and dismissed said cause for want of jurisdiction, to which order of the court said plaintiff, by his counsel, then and there excepted.

And inasmuch as the matters aforesaid do not appear of record, counsel, on behalf of said plaintiff prayed that the said judge would sign and seal this bill of exceptions, and make the foregoing matters a part of the record in this cause, which is done accordingly, this 16th day of June, 1885.

ROMANZO BUNN, [SEAL.]
District Judge.

Endorsed: Filed June 16, 1885.
WM. H. BRADLEY, *Clerk.*

Afterwards, to wit: on the seventeenth day of June, 1885, there was filed in said clerk's office, a bond in said entitled cause, which said bond is in the words and figures following, to wit:

BOND.

Know all men by these presents, that we, William Hartog as principal, and A. M. Pence, as surety, are held and firmly bound unto Henry Memory in the full and just sum of five hundred dollars, to be paid to the said Henry Memory, certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this seventeenth day of June, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas, lately, at a Circuit court of the United States for the Northern district of Illinois, in a suit depending in said court between William Hartog, plaintiff, and Henry Memory, defendant, an order or judgment was rendered against the said William Hartog, and the said William Hartog, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the order or judgment in the aforesaid suit, and a citation directed to the said Henry Memory, citing and admonishing him to be and appear at a Supreme court of the United States, to be holden at Washington the second Monday of October next.

Now the condition of the above obligation is such, that if the said William Hartog shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM HARTOG, [SEAL.]
Per A. M. PENCE, *his att'y in fact.*
A. M. PENCE. [SEAL.]

Approved by: H. W. BLODGETT, *Judge.*

Endorsed: Filed June 17, 1885.
WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, ss.

I, William H. Bradley, clerk of the Circuit court of the United States for said Northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court, in the cause wherein William Hartog is the plaintiff and Henry Memory is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this twenty-sixth day of September, 1885.

[SEAL.] WM. H. BRADLEY, *Clerk.*

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

THE UNITED STATES OF AMERICA,

To the Judges of the Circuit Court of the United Sates, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said Circuit court between William Hartog, plaintiff, and Henry Memory, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said William Hartog, plaintiff, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1885, in the Supreme court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, chief justice of the Supreme court of the United States, this 16th day of
[SEAL.] June, in the year of our Lord one thousand eight hundred and eighty-five, and the independence of the United States the 109th year.

WM. H. BRADLEY,
Clerk U. S. Circuit Court for Northern District of Illinois.

THE UNITED STATES OF AMERICA

To Henry Memory—Greeting:

You are hereby cited and admonished to be and appear at a Supreme court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the Circuit court of the United States, in and for the Northern district of Illinois, wherein William Hartog is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the order or judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this seventeenth day of June, in the year of our Lord one thousand eight hundred and eighty-five.

H. W. BLODGETT, *Judge.*

Services accepted this 17th day of June, 1885.

AUSTIN BIERBOWER.
Atty. for Deft.

116-588

Office Supreme Court U. S.
FILED.
OCT 12 1885
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

WILLIAM HARTOG,
Plaintiff in Error,
vs.
HENRY MEMORY,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

JULIUS ROSENTHAL,
A. M. PENCE,
ATTORNEYS FOR PLAINTIFF IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

WILLIAM HARTOG,
Plaintiff in Error,
vs.
HENRY MEMORY,
Defendant in Error.

STATEMENT.

MAY IT PLEASE THE COURT:

The only question involved in this cause is whether the Circuit court of the United States for the Northern district of Illinois had jurisdiction over the parties.

A suit was brought in *assumpsit* by plaintiff *Hartog* against defendant *Memory*.

The declaration alleged that plaintiff Hartog was a citizen of the kingdom of Holland, and that defendant Memory was a citizen of the State of Illinois.

The defendant pleaded *non assumpsit*, and also the Illinois five year statute of limitation.

The case came on for trial before the court and jury, and a verdict was rendered in favor of plaintiff Hartog. Thereupon the defendant Memory moved to dismiss the cause for want of jurisdiction, and the Circuit court then and there dismissed the case for that alleged cause. The alleged ground for such action of the court appears from the bill of exceptions, and is as follows:

The evidence upon the trial showed that plaintiff was a subject of the kingdom of Holland, and also that defendant resided and had been doing business in the city of Chicago for ten years. During the progress of the examination of defendant at the trial, he was asked by his counsel the following questions and gave the following answers:

"Q. Are you a citizen of the United States, Mr. "Memory?

"A. No, sir.

"Q. Of what dominion or kingdom are you a citizen?

"A. I am a citizen of Great Britain, sir." (Rec., 20, 21.)

He also testified that he had *resided and done business* in the city of Chicago for eight or ten years, and that before that time he had for a short time done business in the city of New York. (Rec., 21.)

Prior to the verdict no exception was taken to the jurisdiction; no plea to the jurisdiction was interposed, and no motion was made to dismiss for want of jurisdiction prior to the verdict.

The issues formed and tried were entirely upon the merits and the plea of the statute of limitation.

By the act of Congress of 1875 on the subject of jurisdiction it is provided:

"If in any suit commenced in the Circuit court or removed from the State court it shall appear *to the satisfaction of* said Circuit court at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit court, or that the parties to such suit *have been improperly or collusively made or joined*, either as plaintiffs or defendants, *for the purpose* of creating a case cognizable or removable under this act, the said Circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the State court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of the Circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme court on writ of error or appeal, as the case may be."

We submit that the court erred in this case in dismissing said cause after verdict, because

1. The Circuit court had jurisdiction of the *subject matter*, and there is nothing in the record showing that the parties *were improperly or collusively* made or joined *for the purpose* of creating a case cognizable under the act.

2. There was no competent proof that defendant was an alien.

3. There was no issue tendered upon the question of

jurisdiction, and by pleading to and trial upon the merits such question was waived, and the court had no right to dismiss such suit, there being no *fraudulent intent* to confer jurisdiction by collusion.

4. The defendant was a citizen of the State of Illinois, under the jurisdiction clause of the United States constitution, by virtue of his domicile, even though he were not a citizen of the United States.

The citizenship here referred to is civil and fundamental, and has no reference to a man's political relations or rights, as exemplified in the case of corporations, where residence united with fundamental civil rights constitute state citizenship for the purpose of jurisdiction under the constitution, independent of all political rights and of all relations to the national government.

I.

THE CIRCUIT COURT HAD JURISDICTION OF THE SUBJECT MATTER, AND OF THE PARTIES.

This was an action of assumpsit, and hence the jurisdiction over the subject was complete. The suit in question involved "a dispute or controversy properly within "the jurisdiction of the court."

The right to dismiss a suit under section five of the act of 1875, which "does not really and substantially involve "a dispute or controversy properly within the jurisdiction "of said Circuit court," relates undoubtedly to that class of cases which does not depend upon the character of the parties, but does depend upon the character of the subject matter, irrespective of parties, as where the subject matter in dispute arises under the constitution or laws of the United States, or treaties made under authority of such laws, and where citizenship cuts no figure. In such case the questions of *fraud or collusion* are not to be considered, and the suit is to be dismissed at any time, because consent cannot confer jurisdiction over the subject matter. Such was clearly the law also under the old statute.

The other part of section five, of the act of 1875, relates to want of jurisdiction over the parties, and it requires a summary dismissal at any time, though the defendants have submitted to the jurisdiction, only where "the parties to the "suit have been *improperly* or *collusively* made or joined, "either as plaintiffs or defendants, *for the purpose* of "creating a case cognizable or removable under this act."

Prior to the act of 1875, this court held that a suit

should be dismissed at any time when a fraud was attempted upon the jurisdiction of the court by collusion, though want of jurisdiction was not pleaded in abatement. See *Barney* v. *Baltimore*, 6 Wall., 280. And that is precisely the definition given of the present statute by this court.

Williams v. *Nottawa*, 104 U. S., 209.
Farmington v. *Pillsbury*, 114 U. S., 143.

In the *Williams* case, this court referred to the extended jurisdiction given to the national courts by the act of 1875, but in doing so, "Congress was especially careful "to guard against the consequences of *collusive transfers* "to make parties, and imposed the duty on the court on "its own motion, without waiting for the parties to stop "all further proceedings and dismiss the suit the moment "anything of the kind appeared. This was for the pro- "tection of the court as well as the parties against *frauds* "upon its jurisdiction."

In *Farmington* v. *Pillsbury*, 114 U. S., 143, this court pointed out again the extension given to the jurisdiction of the national courts in the matter of negotiable paper particularly, by the act of 1875, and the object of § 5. This court then said: "Such was the condition of the "law when the act of 1875 was passed which allows "suits to be brought by the assignees of promissory notes, "negotiable by the law merchant as well as of for- "eign and domestic bills of exchange, if the necessary "citizenship of the party existed. This opened wide the "door for frauds upon the jurisdiction of the court by *col-* "*lusive transfers* so as to make colorable parties and create "cases cognizable by the courts of the United States. "To protect the courts as well as the parties against

"frauds upon their jurisdiction, it was made the duty of "a court at any time when it satisfactorily appeared that a "suit did not 'really and substantially involve a suit or con- "troversy' properly under its jurisdiction, or that the par- "ties 'had been *improperly* or *collusively* made or joined *for* "*the fraudulent purpose* of creating a case cognizable' un- "der that act to proceed no further thereon, but to dismiss "the suit. This is a salutary provision which ought not "to be neglected. It was intended to promote the ends "of justice, and is equivalent to an express enactment of "Congress that the Circuit courts shall not have jurisdic- "tion of suits which do not really and substantially in- "volve a dispute or controversy of which they have cog- "nizance, *nor of suits in which the parties have been im- "properly or collusively made or joined* FOR THE PUR- "POSE of creating a case cognizable under the act."

So we perceive that the act of 1875 simply codified the decisions already rendered upon the question, and probably extended the rule a little farther, so that now where "parties are *improperly* or *collusively* made or joined *for* "*the purpose of creating a case*," the suit may at any time be dismissed; but where there is no collusion, or where parties are not improperly joined *for the purpose* of creating a case, then exception to the jurisdiction must, as heretofore, be raised by plea in abatement.

Smith v. *Kernochen*, 7 How, 198.

Now, in the case at bar, there was no purpose or intent to perpetrate a fraud upon the court. There was no collusion for the purpose or with the intent to give the court jurisdiction. The plaintiff was *a citizen or subject of Holland*, and it was so alleged in the declaration. The defendant resided permanently and was domiciled in the

State of Illinois, and it was in good faith alleged in the declaration that he was a *citizen of the State of Illinois.* There is no pretense that the plaintiff knew or suspected that the defendant was not a citizen of Illinois. He himself testified that he had resided and done business in Illinois for eight or ten years. (Rec., 21.)

In *Shelton* v. *Tiffin*, 6 How., 184, this court said:

"When an individual has resided in a state for a considerable time, being engaged in the prosecution of his "business, he may well be presumed to be a citizen of "such a state, unless the contrary appears."

So it must be conceded, and there is nothing in the record to the contrary, that the plaintiff in good faith and not for any fraudulent purpose made Mr. Memory a defendant in the Federal court.

Defendant in error will contend that residence is not synonymous with citizenship, and that plaintiff was not justified in believing the defendant a citizen on account of his permanent residence there, and he will refer to the case of *Robinson* v. *Cease*, 97 Ill., 646.

What that case decided is simply that an averment of residence in the declaration is not equivalent to an averment of citizenship, for such residence might be temporary, which would not constitute domicile. In that case there was no competent proof in the record of residence or anything else, and the court held the simple averment of residence not equivalent to citizenship.

We submit, therefore, that where there is no fraud attempted upon the court, and where the defendant is the only person guilty of a fraud, that the consequences thereof should not fall upon the plaintiff. The defendant pleaded

to the merits, knowing all the time, if it be a fact, that he was not a citizen, and then finally, and after verdict against him, he attempts to cheat the plaintiff out of the fruits of this suit by perpetrating a moral fraud upon him. The case does not come within the provisions of section five of the act of 1875, and there was no *purpose, no intent* on the part of plaintiff to confer jurisdiction, knowing that the court ought not to exercise it. Hence the general principle should prevail that if a party submits himself to the jurisdiction, and goes to trial upon the merits without a plea in abatement, he cannot afterward raise the question.

Besides, section 5 does not authorize the *defendant* to raise the question at this stage of the case, but only the court has that power, and that, too, only when there was an *intent* on part of plaintiff to fraudulently and collusively confer jurisdiction.

II.

THERE IS NO COMPETENT PROOF IN THIS RECORD THAT THE DEFENDANT IS AN ALIEN, AND IT DOES NOT SATISFACTORILY APPEAR THAT HE IS AN ALIEN, AND HENCE THE CASE IS NOT WITHIN THE STATUTE.

By virtue of the allegations of the declaration, the citzenship of defendant was primarily established. The defendant testified that he was a resident of and doing business in Chicago for ten years last past. He also testified that he was a subject of Queen Victoria. He did not state where he was born, nor who his parents were, whether British subjects or otherwise. It may be the defendant was born in England. That would not necessarily constitute him a subject. He may have been born

of American parents. His father, though once a British subject, may have become naturalized in the United States when defendant was under eighteen years of age, which would render the defendant a citizen of the United States, etc. And so when defendant swore he was a subject of Queen Victoria he swore to a conclusion, which was a mixed question of law and fact, and as to which he might honestly be mistaken.

The evidence was entirely incompetent to prove him a British subject. So far as the evidence detailed by him was concerned it showed him *prima facie* a citizen of Illinois, for he said he had resided and done business in Chicago for ten years. And the conclusion stated by him as to being a British subject is not borne out by the evidence. He did not even state that he was born any where in the British empire.

So it does not satisfactorily appear as required by the statute, that he was not a citizen of Illinois.

The question was really not on trial. No issue was tendered us by him upon that point, and how could we be prepared to meet such a controversy? We were lulled into sleep by his pleading to the merits and going to trial, and had he obtained a verdict we would never have heard of the question. It is a gross fraud on the part of defendant, upon the plaintiff, and if not compelled to do so, this court will not permit it to be effectual. This court in *Williams* v. *Nottawa*, 104 Ills., 212, said: "Whether, if "a defendant allows a case to go until judgment has been "rendered against him, he can take advantage of the ob-"jection by appeal or writ of error, we need not now de-"cide." And that was said even when it was conceded

that the plaintiff by *collusion* attempted to confer jurisdiction. The intimation then thrown out by the court now becomes a question for decision, and we feel that fraud cannnot be thus permitted to triumph.

III.

WHAT CONSTITUTES STATE CITIZENSHIP?

Naturalization under the United States laws is necessary to constitute a foreign born subject a citizen of the United States, with one or two exceptions.

Naturalization is not necessary to constitute a foreign born subject *a citizen of a state*, but permanent residence or domicile constitutes him a citizen of a state.

United States citizenship and state citizenship are two things, and the one is not necessary to the other.

In the Slaughter House cases, 16 Wall., 36, the Supreme court of the United States clearly laid down the distinction between a citizen of the United States and a citizen of the state. Said the court in that case:

"The distinction between citizenship of the United "States and citizenship of a state is clearly recognized "and established.

"Not only may a man be a citizen of the United States "without being a citizen of a state, but an important ele- "ment is necessary to convert the former into the latter. "*He must reside in the state to make him a citizen of it*, "but it is only necessary that he should be born or natur- "alized in the United States to be a citizen of the Union.

"It is quite clear then that there is a citizenship of the "United States, and a citizenship of a state which are dis- "tinct from each other, and which depend upon different "characteristics or circumstances in the individual."

And the court quoted the language of Justice WASHINGTON on the subject as follows:

"The inquiry is, what are the privileges and immuni- "ties of citizens of the several states? We feel no hesi- "tation in confining these expressions to those privileges "and immunities which are *fundamental;* which belong "of right to the citizens of all free governments, and "which have at all times, been enjoyed by citizens of the "several states which compose this Union, from the time "of their becoming free, independent and sovereign. "What these fundamental principles are it would be "more tedious than difficult to enumerate. They may all, "however, be comprehended under the following general "heads: Protection by the government, with a right to "acquire or possess property of every kind, and to pur- "sue and obtain happiness and safety; subject, neverthe- "less, to such restraints as the government may prescribe "for the general good of the whole."

That court further said: "That they are in the lan- "guage of Judge Washington, those rights which are fun- "damental. Throughout his opinion, they are spoken of as "rights belonging to the individual as a citizen of a state, "and they have always been held to be the class of rights "which the state governments were created to establish "and secure. * * * * But with the exception of "these and a few other illustrations, the entire domain of "the privileges and immunities of citizens of the states

"as above defined, lay within the constitutional and legis-
"lative power of the states and without that of the fed-
"eral government."

2 Story Const., § 1,937.

The constitution of the United States provides that citizens of the United States shall be citizens of the state where they may reside, but this does not exclude other persons from also being citizens. In saying that grass is green, we do not mean that nothing else is green. The constitution of the United States does not, therefore, define state citizenship, except that no citizen of the United States can be excluded from citizenship in the state where he may be domiciled. The constitution of the state does not define the term, nor do the laws of the state. We must therefore look to international law, which is a part of the common law, for a definition.

With this distinction in mind, let us examine some authorities with reference to what would constitute state citizenship, according to the principles of international law.

No formula is required, no naturalization, but simply the act of the individual in taking up his domicile in a state, conducting there his business, and making himself subject to the laws of such state, and becoming entitled to the protection of such laws. This constitutes state citizenship as contradistinguished from United States citizenship.

Kent, in his commentaries (Vol. 1, page 74), says: "The position is a clear one that if a person goes to a "foreign country and engages in trade there, he is, by the "law of nations, to be considered a merchant of that "country, *and a subject for all civil purposes.*"

And on page 75 he further says:

"This same principle that, for all commercial purposes, "the *domicile* of the party, without reference to the place "of birth, becomes the test of national character, has been "repeatedly and explicitly admitted in the courts of the "United States."

And further on he says: "The *animus manendi* appears "to have been the point to be settled. The presumption "arising from actual residence in any place is that the "party is there *animo manendi*, and it lies upon him to "remove the presumption." And he further says, on page 77: "When the residence is once fixed, and has "communicated a national character to the party, it is "not divested by a periodical absence, or even by occa-"sional visits to his native country."

He further says, on page 78: "A national character, "acquired by residence, may be thrown off at pleasure by "a return to the native country."

And Kent says with reference to the case of *The Venus*, 8 Cranch, 253: "The decisions of the English courts on "the subject of national character acquired by residence, "and the consequences of such acquired character, were "recognized as being founded on sound principles of pub-"lic law." And he further says, on page 79: "In the law "of nations as to Europe, the rule is, that men take their "national character from the general character of the "country in which they reside; and this rule applies "equally to America."

This discussion by Kent, of course, is with reference to the rights of domiciled foreigners in time of war; and the authorities seem to be without conflict, that for all civil

purposes they are citizens of the country or state where they reside. The question of their political rights and allegiance is entirely another thing, and we think that we will be able to show that, under the constitution and laws of Congress with reference to *state* citizenship, in order to give the United States courts jurisdiction, only the civil and commercial, and not the political relationship of parties is considered, and that citizenship spoken of in those laws has no reference to political rights, citizenship or allegiance.

In the case of *The Venus* (8 Cranch, 277), which is the same case referred to by Chancellor Kent, the Supreme court of the United States gives a very full discussion upon the subject.

The court there said:

"The question of law alone remains to be considered. "First, by what means and to what extent a national "character may be imposed upon a person different from "that which permanent allegiance gives him; and sec- "ondly, * * * writers upon the laws of nations "distinguishing between a temporary residence in a for- "eign country for a special purpose, and a residence "accompanied with an intention of making it a permanent "place of abode. The latter is styled by Vattel, *domicile*, "which he defines to be 'a habitation fixed in any place "with an intention of always staying there.' Such a "person, says this author, becomes a member of the new "society at least as a permanent inhabitant, and as a kind "of citizen of any inferior order from the native citizen, "but is nevertheless united and subject to the society "without participating in all of its advantages. Grotius "nowhere uses the word domicile, but he also distin-

"guishes between those who stay in a foreign country by "the necessity of their affairs, or from any other tempo- "rary cause, and those who reside there from a perma- "nent cause; the former he denominates strangers, and "the latter subjects." The court then further proceeds to notice the English authorities, where it is decided: "That whilst an Englishman or a neutral resides in a "hostile country, he is a subject of that country, and is to "be considered (even by his own or native country in "the former case) as having a hostile character impressed "upon him * * * On this ground it is that the "courts of England have decided that a person who re- "moves to a foreign country, settles himself there, and "engages in the trade of the country, furnishes by these "acts such evidence of an intention permanently to "reside there as to stamp him with the national "character of the state where he resides. * * * "And why, it may be confidently asked, should not "the property of such subjects be exposed to the law of "reprisals and of war so long as the owner retains his "acquired domicile, or in the words of *Grotius*, continues "a permanent residence in the country of the enemy? "They were before and continue after the war, bound by "such residence to the society of which they are mem- "bers, subject to the laws of the state and owing a quali- "fied allegiance thereto. *They are obliged to defend it* "(with an exception in favor of such a subject in relation "to his native country) *in return for the protection it* "*affords them, and the privileges which the law bestows* "*upon them as subjects.* The property of such persons, "equally with that of the native subjects, in their totality is "to be considered as the goods of the nation in regard to "other states; it belongs in some sort to the state from the

"rights which she has over the goods of its citizens which "make a part of the sum total of its riches and augment "its power. Now if a permanent residence constitutes the "person a subject of the country where he is settled so "long as he continues to reside there, it is difficult to main- "tain, etc."

In the case of *Friendshaft*, 3 Wheat., 16, the Supreme court of the United States held that "a merchant acquires "the character of the nation in which he resides and "carries on trade."

In the case of *Lestapies* v. *Ingraham*, 5 Pa. St., 80, Chief Justice GIBSON says: "It is well settled that a "subject or a citizen of one country may become a sub- "ject or a citizen of another by the change of his domicile "in time of peace, and acquire the commercial character "and rights of a native. *He is undoubtedly entitled to "the civil rights and protection within the country of his "domicile.*"

In the case of *Lessee of Cooper* v. *Galbraith*, 3 Wash. C. C. Reports, 553, WASHINGTON, Justice, charged the jury as follows:

"The question of jurisdiction is first to be considered, "it is composed of law and fact, and as soon as the latter "is ascertained, the question is relieved from every diffi- "culty. *Citizenship, when spoken of in the constitution "in reference to the jurisdiction of the courts of the United "States, means nothing more than residence.*"

"To give jurisdiction to the courts of the United States, "the suit must be brought between citizens residing in "different states or between citizens and an alien. If a "citizen of one state should think proper to change his

"domicile, and to remove himself and family, if he went "into another state with a *bona fide* intention of abandon- "ing his former place of residence and to become an in- "habitant or resident of the state into which he removes, "he becomes immediately upon such removal accompanied "with such an intention a resident or citizen of this state, "and may maintain an action in the Circuit court of the "state which he has abandoned, or in that of any other "state except the one in which he has settled himself."

The same was held by Justice Washington in *Byrne* v. *Holt*, 2 Wash. C. C. Reports, 282.

The question was decided in the same way in *Knox* v. *Greenleaf*, 4 Dall., 360. So we find in the case of *Shelton v. Tiffin*, 6 How., 184, the question was decided in the same way.

The question there arose as to whether the defendants were citizens of the State of Louisiana, and the Supreme court of the United States, the opinion being delivered by Justice McLean, said: "But the proof of citizenship when "denied may be satisfactory though all the privileges "and rights of a citizen may not be shown to have been "claimed or exercised by the individual. * * Where "an individual has resided in a state for a considerable "time, being engaged in the prosecution of business, he "may well be presumed to be a citizen of such a state "unless the contrary appear, and this presumption is "strengthened where the individval lives on a plantation "and cultivates it with a large force, as in the case of "Shelton, claiming and improving the property as his "own."

In *Case* v. *Clark*, 5 Mass., 70, Judge Story held that the

constituting a person a citizen of a state so as to sue in the courts of the United States he must simply have a domicile in such state. That residence in such state constitutes citizenship.

In the case of *Field* v. *Andreon*, 7 Md., 209, it was held that a resident alien, who had not declared his intention, and was entitled to no political rights under the laws of the state, was still a citizen within the meaning of the attachment laws of that state against "absconding citizens." The court said: "We are of the opinion that as the debtor "was residing and doing business in Baltimore, he was, in "contemplation of our attachment laws, a citizen of this "state, and as such having actually run away to avoid his "creditors, was liable to be proceeded against as an ab-"sconding citizen.

"We do not now wish to be understood as claiming the "debtor in this case was a citizen for every purpose and "in every sense. *A party may not be a citizen for politi-"cal purposes, and yet be a citizen for business or commer-"cial purposes.* In the present instance we simply deter-"mine that Kennedy for commercial objects was a citizen "of this state in contemplation of our attachment system."

A very full and convincing discussion as to the distinction between state citizenship and United States citizenship will be found in *In re Wehlitz*, 16 Wis., 443. The question arose during the late civil war, under the act of Congress as to whether an alien resident in the state of Wisconsin, and making that his permanent abode, was subjet to be drafted into the armies of the United States, and the question directly to be determined was whether he was a citizen of the state, although it was admitted that he was not a citizen of the United States. The opinion

can only be fully appreciated by a close reading, but we will make such extracts as seem to us desirable. The court said:

"Under our complex system of government *there may* "*be a citizen of a state who is not a citizen of the United* "*States in the full sense of the term.* This would "seem to result unavoidably from the nature of the two "systems of government. Each state, being sovereign "except as to matters referred to the general government, "may as an undoubted result of their sovereignty, confer "such rights of citizenship as it please, so far as it relates "to itself only, but the power having been delegated to "congress to pass uniform naturalization laws, and it "being conclusive in its character, no state can confer "such rights of citizenship upon an alien who has not "complied with the laws of Congress, so as to make him "a citizen of the United States, and entitled to the rights "and privileges guaranteed to the citizen by the federal "constitution." And the court refers to the celebrated case of the Hungarian exile *Koszta*, and the position taken in reference to him. In that case, he had declared his intention to become a citizen under the laws of Congress. In the State of New York, whose constitution and laws do not confer upon him any political rights, he was still held to be a domiciled citizen, and invested with a national character as such, and entitled to the protection of the government abroad, and Congress awarded a medal to Commodore Ingraham, who so promptly extended his protection to the Hungarian exile, and the court makes the following extract from a letter of *Secretary Marcy* in the correspondence which followed. The secretary said: "This right to protect persons having domicile, though "not native born or naturalized citizens, rests on the firm

"foundation of justice; and the claim to be protected, is "earned by considerations which the protecting power is "not at liberty to disregard. Such domiciled citizen pays "the same price for his protection as native born or "naturalized citizens pay for theirs. He is under the "bonds of allegiance to the country of his residence, and "if he breaks them, incurs the same penalties; he owes "the same obedience to the civil laws, and must discharge "the duties they impose on him; his property is in the "same way and to the same extent, liable to contribute "to the support of the government; in war he shares "equally with them in the calamities which may befall the "country; *his services may be required for its defense;* his "life may be periled and sacrificed in maintaining its "rights and vindicating its honor. In nearly all respects, "his and their condition, as to the duties and burdens of "government are undistinguishable."

The political code of the State of New York commences with an announcement that "the sovereignty of "the state resides in the people thereof," and the people is said to consist, 1, "of citizens who are electors." 2. "Of citizens who are not electors."

Holland on Jurisprudence, 250.

If a man, by his permanent residence in a state, is subjected to military duty in that state, and is bound to protect it the same as the naturalized or native citizen, as was held by this court in *The Venus*, 8 Cranch, 277, and if in return he receives the protection of the laws of such state for all his civil rights, as all the authorities clearly show, it seems strange indeed that he should not be held to be a citizen for the purpose of suing or being sued in the courts of the United States. In addition to the gen-

eral rule of international law, section 1, article 12, of the constitution of Illinois provides that "the militia of the "State of Illinois shall consist of all able-bodied male per- "sons resident in the state between the ages," etc.

Political rights have nothing to do, however, with constituting a person a citizen of a state, for women and minor children are deprived of political rights, but still they have the same civil rights as a man, and no one has ever doubted that they are citizens of the state where they reside. They have no more rights, however, than a domiciled foreigner, nor, indeed, are the same obligations and duties required of them as is required of the resident foreigner. They are not bound by law to fight for the protection of the state, which is one of the heavy obligations imposed upon a domiciled foreigner, for which and in consideration of which he receives the protection of a citizen, and is a citizen of the state for all the *fundamental* purposes of government. Political allegiance is entirely a different question, and is based entirely upon other considerations. To be a citizen of the United States is to have political protection abroad to a fuller extent, but so far as his fundamental rights are concerned, as is stated in the *Slaughter house cases*, he is bound to look to the government of the state of which he is a domiciled citizen.

It is perfectly clear that the constitution of the United States, touching the jurisdiction of the United States courts, and the laws passed in pursuance thereof, used the word, "citizen" of a state, as simply a person entitled to the protection of his civil and commercial rights by the state, and who is a resident in such state. This can be demonstrated by reference to the decisions of the Supreme

court of the United States touching the rights of a corporation to bring suit in the United States courts.

A corporation has civil rights to be protected, and has a residence in a state for the purpose of carrying on business, but it has no political rights. The Supreme court of the United States originally decided that a foreign corporation could bring suit in the United States courts the same as a citizen of another state, for the reason that the owners of such corporation resided in such other state, but when the question arose where the owners of a corporation did not reside in the same state with the corporation where it was created, then it became incumbent upon the Supreme court of the United States to find a better basis for its decisions, and it did so without any hesitation, and placed the same upon the broad ground that whoever resides in a state, and carries on business in a state, has certain civil rights, and is a citizen of such state, and within the constitution and laws of the United States, which enable it to sue and be sued in the courts of the United States.

We refer to the decision of *Louisville Railroad Company* v. *Letson*, 2 How., 555. In that case, after fully reviewing the court's former decisions and admitting the weakness of the principle upon which they were based, the court finally came to the conclusion which is expressed in the following words:

"A corporation created by a state to perform its func-
"tions under the authority of that state and only suable
"there, though it may have members out of the state,
"*seems to us to be a person, though an artificial one, inhab-*
"*iting and belonging to that state and therefore entitled,*

"*for the purpose of suing and being sued, to be deemed a* "*citizen of that state.*"

We have here a definition of the meaning of a citizen of a state as used in the constitution and laws of the United States now under consideration, and it fully conforms with the decisions heretofore quoted and referred to, both English and American, that he is a citizen of a state who resides in it, who is permanently domiciled there, who does business in such state, and who receives the protection of the laws of such state; and such person need have no political rights. The corporation has no political rights. A domiciled foreigner need owe no allegiance to the government of the United States; a corporation owes no allegiance to the general government, and in whatever view we may examine the matter, only one conclusion can be arrived at, which is this: that the defendant in this case *is a citizen of the State of Illinois*, permitting him to be sued by an alien in the United States courts.

It even might be true that the defendant *Memory* had the right of election to be considered an alien, or to be considered a citizen of the state, and by filing his plea to the merits, and by going to a trial of his cause, he elected to be considered a citizen of the state, and it is now too late for him to assert his rights as an alien. Having made his election when he pleaded, he is bound to stand by it, and the court cannot prevent the effect of such election, and upon its own motion, or the motion of defendant, to refuse jurisdiction. By his election he has brought himself within the jurisdiction. Domiciled and residing in the State of Illinois, he possessed a dual character; one as political subject to the queen of Great

Britain, the other as citizen of the State of Illinois. So long as he remains a citizen of the State of Illinois and remains unnaturalized, he is a subject of the queen of Great Britain only for *political* purposes, and as touching his *political* rights, but as citizen of the State of Illinois he is protected in his *civil* rights.

Judge DILLON, in his work on removal of causes, states in a note that "citizenship of a state for the purpose of "conferring federal jurisdiction, has reference to domicile "and residence, and not to the rights of suffrage."

We deem it our duty notwithstanding all of the foregoing decisions, to refer to a decision of Mr. Justice MILLER on the circuit, in the case of *Lanz* v. *Randall*, 4 Dill., 425.

That case was properly decided, no doubt. We think it probable that Justice Miller made some remarks concerning state citizenship which would not have been made by him, had he had the advantage of full consideration upon all the authorities. It was made upon the circuit, and undoubtedly in the hurry of business. The question there was whether an *alien*, a subject of the grand duke of Mecklenburg, who had resided in the State of Minnesota for fifteen years, and who even exercised political rights under the constitution of that state, had lost his character as an alien so as to prevent him from taking a change of venue from the state to the United States court.

Now, we think it perfectly clear, that never having been naturalized in the United States, he did so retain his foreign character in a certain political sense. That is, never having become a citizen of the United States, he

remained a subject of the grand duke as between the United States and the duke of Mecklenberg. He was a subject *sub modo* of that country and not a citizen of the United States, consequently he was an alien, and had the right to remove his suit to the United States court before any steps were taken therein, for he falls strictly within the letter of the constitution of the United States. But suppose that he had elected to rely upon his *state civil citizenship* before he elected to rely upon his political alienage, then another question would have arisen. Possessing the dual character of a political alien who had not yet renounced his political allegiance, and a citizen of a state, he had a right to elect by which he would stand, and having then elected to stand by his *foreign* political character, the United States court could not bar him out.

But that is a different question from this, for when a citizen has elected to stand by his state citizenship, he cannot in the same suit make a second election. Much that is said by Justice MILLER in that opinion upon the question of state citizenship is true. He says:

"There is no necessary or uniform relation between "citizenship and the right to vote. In point of fact, un- "der the constitution of Minnesota, and probably of every "other state, only about one in five of its citizens are per- "mitted to vote. All citizens born in the state and resid- "ing there are citizens. But unless they come to the age "of twenty-one years they cannot vote. They have, how- "ever, all the rights that belong to citizenship, because "they are citizens; so are all females of all ages who con- "stitute half of the citizens of any state. * * * * "The error (of counsel) has arisen from the same con- "fusion of ideas which induced the advocates of female

"suffrage to assert in the Supreme court the right of "women to vote. That assertion is based upon the as- "sumption that citizenship and the right to vote are in- "separable, therefore females who are citizens must be "allowed to vote. This was unanimously overruled."

The probable error of Justice Miller in that case is in assuming "that no state can make a subject of a foreign "prince a citizen of the *state* in any other mode than that "provided by the naturalization laws of Congress." He probably meant that no *foreigner can be made* a citizen of the United States in any other mode than that pointed out by the naturalization laws of Congress. Congress has never attempted, and probably has not the power, to determine who shall be citizens of a state. That question depends upon *fundamental* principles not under the control of the general government. He probably overlooked the method by which corporations are made citizens of states.

Justice Miller was not called upon to define citizenship of a state. It was not necessary to the decision of that case. The party there was not a citizen of the United States; that was admitted, consequently he was an alien in respect to the government of the United States; and as such alien, he had a right to sue in the United States courts when the defendant was a citizen. Whether he also had the character of a citizen of the State of Minnesota cut no figure for the reason that he elected at the earliest possible moment to assert his right as a political alien, which he was.

Mr. WHARTON says: "The United States government, "while determining his political *status*, does not determine

" his personal *status*. To get at that *status*, we have to " inquire in what state he is *domiciled*. Nationality in the " United States determines, with the single exception of " bankruptcy, only political *status*."

Wharton, Conflict of Laws (2d Ed.), § 8, Cap. 1.

See also note 1 to this section in the last edition, where there is a full discussion of state citizenship, in which the author takes issue with *Justice Miller* in the case of *Lanz* v. *Randall*, above referred to.

If the motion in this case should prevail, then a party would never be bound by any election made by him to be considered as a citizen of the state or as a political alien, but he could change whenever he chose, and after a verdict against him. This cannot be. This is a fraud. This is not carrying out the intention of the United States constitution, or the statutes of Congress. If a corporation can be a citizen of a state, then can any other person or artificial being be a citizen upon the same terms. If one has no political rights, neither has the other. If one is a citizen for the purpose of suing or being sued, so is the other. Honesty, fair dealing and the true interests of the community demand that Mr. Memory, who has enjoyed the protection of the laws of Illinois for many years, who has possessed his liberty under them and been protected in his rights and property, should not now be permitted to renounce his character as citizen for the purpose of defeating another in an honest demand. Had he elected in the first instance to stand by his political alienage and allegiance as between him and the United States, and filed a plea in abatement, we would have had nothing to say; but having chosen to waive that right and to rely

upon his state citizenship, as he did by filing his plea and going to trial, he must now be held to such election. As between the government of Great Britain and the United States, he is a political alien. As between the government of Great Britain and Illinois, he is a citizen of the latter as to all fundamental rights, civil and commercial, which a state government can confer and hence within the jurisdiction of this court.

Hence we submit that said judgment of the Circuit court be reversed and cause remanded.

JULIUS ROSENTHAL,
A. M. PENCE,
Att'ys for Plaintiff in Error.

CHICAGO, October 1, 1885.

116-588

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

WILLIAM HARTOG,
Plaintiff in Error,
vs.
HENRY MEMORY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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In Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

MAY IT PLEASE THE COURT:

This was an action brought in the Circuit court of the United States, for $5,000, by a citizen of the Kingdom of Holland against a citizen and subject of Great Britain, who was temporarily doing business between Chicago and foreign countries, and for that purpose temporarily stopping in Chicago. No evidence was produced by the plaintiff at the trial tending to show that the Circuit court has jurisdiction. The plaintiff testified that he is a resident and citizen of Holland, as alleged in the declaration; but no evidence was introduced to show that the defendant was a resident or citizen of the United States, or of any state.

The defendant himself in his cross-examination merely stated, in regard to his temporary sojourn in Chicago, that he had resided and done business there, he supposed about from eight to ten years, and that for a short time before he had done business in New York. During this "residence" in Chicago, however, he was, as appears from the record part of the time abroad, being twice in Holland in 1879 (Rec., 14), and the alleged contract sued upon was made when abroad, and, as appears from the declaration, was to be executed abroad. The defendant stated upon his examination, which was confirmed by his cross-examination, that he was not a citizen of the United States, but a citizen of Great Britain. (Rec., 14). This is all the evidence that was produced in regard to the citizenship or residence of the defendant.

These facts being disclosed in the evidence, the case presented by the plaintiff to the jury was, therefore, that of a claim growing out of an alleged contract between two aliens, made in foreign parts and to be executed in foreign parts, and brought to this country and sued here in a court of special jurisdiction, on the false hypothesis that the defendant was a citizen of the State of Illinois.

These facts appearing, the defendant, after verdict (for $2,497), moved the court to dismiss the case for want of jurisdiction, which motion was granted, and the suit accordingly dismissed; whereupon the plaintiff seeks to have this order reversed and the verdict below sustained.

I submit that the order of the Circuit court should be allowed to stand, and the writ of error dismissed, because—

1. The Circuit court of the United States has no jurisdiction of suits between aliens.

2. The defendant in error, being an alien, is not a citizen of the State of Illinois in contemplation of the Federal constitution and laws.

3. The objection to the jurisdiction of the Circuit court may be raised at any time; and

4. The Supreme court of the United States has no jurisdiction to review the order of dismissal, inasmuch as the amount involved is less than $5,000.

BRIEF.

I.

THE CIRCUIT COURT OF THE UNITED STATES HAS, UNDER THE CONSTITUTION AND FEDERAL STATUTES, NO JURISDICTION OF SUITS BETWEEN ALIENS.

Constitution of the United States, Art. III, Sec. 2, item 1.
Act of Jurisdiction March 3, 1875, Chap. 137, Sec. 1.
16 Wall., 95, 112, 126.
Montalet v. *Murray*, 4 Cranch, 46.
Mossman v. *Higginson*, 4 Dall., 12.
Jackson v. *Twentyman*, 2 Peters, 136.
Robertson v. *Cease*, 97 U. S., 646.
1 Kent's Com., 343, 344.
16 Wall., 95, 112, 126.
Bates on Citizenship, 14, 17.
Scott v. *Sandford*, 19 How., 393.

II.

THE DEFENDANT, BEING AN ALIEN, IS NOT A CITIZEN OF THE STATE OF ILLINOIS IN CONTEMPLATION OF THE FEDERAL CONSTITUTION.

16 Wall., 95, 112, 126.
Dred Scott v. *Sandford*, 19 Howard, 393.
1 Kent's Com., 344.
2 Kent's Com., 70.
Lanz v. *Randall*, 4 Dill., 425.
8 Cr., 290.
Constitution of the U. S., Art. III, Sec. 2, Cl. 1; Art. IV., Sec. 2.
Howenstein v. *Lynham*, 100 U. S., 483.
Robertson v. *Cease*, 97 U. S., 646.
Montalet v. *Murray*, 4 Cr., 46.
Parker v. *Overman*, 18 How., 137.
Pascal's Annotated Constitution, p. 224.
Bates on Citizenship, 14–17.
Jackson v. *Twentyman*, 2 Peters, 136.
Elk v. *Wilkins*, 112 U. S., 94, 107.

III.

OBJECTION TO THE JURISDICTION CAN BE RAISED AT ANY TIME.

Statute of Mar. 3, 1875, Chap. 137, Sec. 5, (1 Sup. Revised Stat. U. S., p. 175.)
Mansfield, Coldwater and Lake Michigan Railway Company et al. v. *Swan et al.*, 111 U. S., 397.

Farmingham v. *Pillsbury*, 114 U. S., 138.
Williams v. *Nottawa*, 104 U. S., 209.
Rae v. *Grand Trunk Ry. Co.*, Cir. Ct., E. D. Mich., 14 Federal Reporter, 401.
Börs v. *Preston*, 111 U. S., 252.

IV.

THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO REVIEW THE ORDER OF DISMISSAL, INASMUCH AS THE MATTER IN DISPUTE DOES NOT EXCEED $5,000.

Whitsitt v. *Railroad Co.*, 103 U. S., 770.
Walker v. *United States*, 4 Wall., 163.
Sec. 3, Art. of Feb. 16, 1885. (1 Sup. Revised Stat. U. S., p. 136).
Revised Stat. U. S., Sects. 691, 692, 699.

ARGUMENT.

I.

THE CIRCUIT COURT OF THE UNITED STATES HAS, UNDER THE CONSTITUTION AND FEDERAL STATUTES, NO JURISDICTION OF SUITS BETWEEN ALIENS.

Jurisdiction is given to the Circuit court only in "a con-"troversy between citizens of a state and foreign states, "citizens or subjects." (Act of Jurisdiction, Mar. 3, 1875, Chap. 137, Sec. 1.) The constitution authorizes

no other jurisdiction. (Const. U. S., Art. III, Sec. 2, item 1.)

The decisions of this court uniformly construe the words "citizens of a state" in this clause as contradistinguished from "aliens," and as excluding the latter—citizens of the United States, whether native or naturalized, as opposed to "foreigners." Neither the constitution nor the act of jurisdiction gives any power to the Federal courts in controversies between aliens.

In *Mossman* v. *Higginson*, 4 Dall., 12 the Supreme court say: "As the legislative power of conferring a jurisdiction on the Federal courts is in this respect confined "to suits between citizens and foreigners, we must so ex- "pound the terms of the law as to meet the case where, "indeed, an alien is one party but a citizen is the other. "Neither the constitution nor the act of Congress regard, "on this point, the object of the suit, *but the parties.*"

In *Montalet* v. *Murray*, 4 Cranch, 46, the Supreme court of the United States was unanimously of the opinion that the "courts of the United States have no juris- "diction of cases between aliens."

In *Lanz* v. *Randall*, 4 Dill., 425, the court say:

"No state can make a subject of a foreign prince *a cit-* "*izen of the state* in any other mode than that provided "by the naturalization laws of Congress;" and therefore that mere residence in a state does not give jurisdiction to the Circuit court.

In *Jackson* v. *Twentyman*, 2 Peters, 136, the court held that the statutes giving jurisdiction to the Federal courts "must be construed in connection with and in conformity "to the Constitution of the United States, that by the lat-

"ter the judicial power was not extended to private suits "in which an alien is a party unless a citizen be the "adverse party."

The decisions regarding jurisdiction thus uniformly contrast "citizens" with "aliens." No jurisdiction was ever given to the Federal courts in controversies between aliens, any more than in controversies between citizens of the same state.

It has been repeatedly held that residence is not citizenship for the purpose of giving jurisdiction to the Federal courts. While "citizenship," in a popular sense, may be obtained by a resident of one state in becoming a resident of another state, and while political and other rights of American citizenship can be carried from county to county, and from precinct to precinct, without any formalities, it is entirely different when it concerns foreigners. No naturalization is required of an American in passing from citizenship in one state to citizenship in another; no foreign allegiance is renounced, no oath is taken, no promises are exacted. The right of American citizenship may be exercised wherever an American is found. Migration from state to state and county to county is made easy. Only a few months, as a rule, are necessary in order to acquire all the rights of a citizen anywhere, if one is already a citizen of the United States. And the authorities cited in plaintiff's brief, with a view to show that mere residence gives citizenship sufficient for jurisdiction, had in view the residence and consequent citizenship established by *an American citizen, in going from one state to another*, or from one county or precinct to another. Neither the Federal nor the state legislatures ever contemplated making the terms of acquiring citizenship in a state as difficult for an American as for a foreigner. The

first becomes a citizen of any state in which he may go by merely remaining a year or taking up a residence for a short time with the intention of remaining. A foreigner, however, before he can acquire such citizenship in a state, must become naturalized and take many formal and technical steps.

Accordingly, it has been repeatedly held that residence is not citizenship when it is a question of giving Federal jurisdiction.

Robertson v. *Cease*, 97 U. S., 646.
Parker et al. v. *Overmann*, 18 How., 137,
S. C. Hemp., 692.

In *Robertson* v. *Cease*, 97 U. S., 646, the court say: "Citizenship and residence, as often declared by this "court, are not synonymous terms." In this case the evidence was that Cease "resides in the county of "Macon and State of Illinois." In his deposition used at the trial he says: "My name is Henry Cease; res- "idence, Macon county, Illinois; age, fifty-two years; oc- "cupation, grain dealer and farmer;" and yet the court held that this did not constitute him a citizen of the state, so as to give the Circuit court jurisdiction.

It has been held even that the mere declaration of an intention to become a citizen leaves one an alien, and is not sufficient to confer jurisdiction on a Federal court. *Baird* v. *Byrne*, 3 Wall., Jr., 1.

Chancellor Kent (1 Kent's Com., 343,) says:

"The constitution gives jurisdiction to the Federal "courts of all suits *between aliens and citizens*, and between "resident citizens of different states. * * * In *Bing-* "*ham* v. *Cabot*, 3 Dall., 482, the Supreme court held

"that it was necessary to set forth the citizenship of the "respective parties, *or the alienage when a foreigner was* "*concerned* by positive averments, in order to bring the "case within the jurisdiction of the Circuit court, and "that if there was not sufficient allegation for that pur- "pose on record, no jurisdiction of the suit would be sus- "tained. The same doctrine was maintained in *Turner* "v. *Enrille*, 4 Dall., 8, and in *Turner* v. *The Bank of* "*North America*, 4 Dall., 8, and it was declared that the "Circuit court was a court of limited jurisdiction, and had "cognizance of only a few cases specially circumstanced, "and that the fair presumption was, that a cause was "without its jurisdiction till the contrary appeared."

And again ditto, p. 344.

"The judiciary act of 1789, section 11, gives juris- "diction to the Circuit court when an alien is a party; "and it was decided in *Mossman* v. *Higginson* (4 Dall., "8), that the jurisdiction was confined to the case of suits "between *citizens and foreigners*, and did not extend to "suits between *alien and alien;* and that if it appeared on "record that the one party was an alien, it must likewise "appear affirmatively that the o her party was a citizen. "So again in *Course* v. *Stead* (4 Dall., 22), it was de- "cided to the same effect. The principle is that it must "appear upon the record that the character of the parties "supports the jurisdiction; and the points in that case "were re-asserted in *Montalet* v. *Murray* (4 Cr., 46), "and in *Hodgson* v. *Bowerbank*, 5 Cr., 303, and in *Sulli-* "*van* v. *The Fulton Steamboat Co.* (6 Wheat., 450.)"

In *Montalet* v. *Murray*, 4 Cranch, 46, already referred to, where "the court was unanimously of opinion that the "courts of the United States have no jurisdiction of cases

"between aliens," the reporter states that after the foregoing decision "Key then suggested that perhaps it did "not sufficiently appear upon the record that the original "parties were aliens. But Chief Justice Marshall said "that if it did not appear upon the record that the char-"acter of the original parties would support the jurisdic-"tion, that objection was equally fatal under the uniform "decisions of this court."

I can find no authority, nor intimation, in any of the books, to the effect that if one of the aliens is a resident, it cures his alienage so as to give jurisdiction to the United States courts. The uniform current of decisions, as well as the declarations of the text-book writers, is, that the fact that one is an alien, no matter what his residence may be, takes away the jurisdiction of the Circuit court when the other party is also an alien.

Alienage, according to Bates (Bates on Citizenship, 14–17), is the only disability to citizenship recognized in the constitution.

The court has thus invariably held that no suits between aliens can be entertained by the Circuit court, but that a "citizen of the state," in contemplation of the constitution and of the judiciary act, in conferring jurisdiction on the Federal courts, means one who is also a citizen of the United States.

Justice Field, in commenting on the *Slaughter-House* cases, says (16 Wall., 95):

"*A citizen of a state is now only a citizen of the United "States residing in that state.*"

Justice Swayne also says that to be a citizen of the state

one must be a citizen of the United States. His words are (Do., 16 Wall., 126).

"A citizen of a state is *ipso facto* a citizen of the United "States. No one can be the former without being also "the latter."

Justice Bradley still more fully says (Do., 16 Wall., 112):

"The question is now settled by the fourteenth amend- "ment itself, that citizenship of the United States is the "primary citizenship in this country, and that state citizen- "ship is secondary and derivative, depending upon citizen- "ship of the United States and the citizen's place of resi- "dence."

Here we have a definition of "a citizen of a state" by three of the leading jurists of the country, all of them judges of the Supreme court of the United States, and they all agree in declaring that to be a "citizen of a state," in the sense contemplated by the Federal constitution, one must be also a citizen of the United States.

The authorities are thus conclusive of the doctrine that when one of the contestants is an alien, the other must not be an alien, but must be a citizen of the United States in order to give jurisdiction to the Circuit court.

This being so, it may seem superfluous to this court to discuss the next proposition, namely, that the defendant in error, being an alien, is not a citizen of the State of Illinois in contemplation of the Federal constitution. But the counsel for plaintiff in error has made the opposite proposition the burden of his whole argument. I may, therefore, be pardoned for replying at some length, in which reply the authorities cited will further sustain the point already made.

II.

THE DEFENDANT, BEING AN ALIEN, IS NOT A CITIZEN OF THE STATE OF ILLINOIS IN CONTEMPLATION OF THE FEDERAL CONSTITUTION.

A labored argument occupies the last twenty pages of the brief of plaintiff's counsel, to show that *residence* constitutes state citizenship, and that, therefore, Mr. Memory though an alien, is yet a citizen of Illinois, for the purpose of sustaining the jurisdiction of this court in this case. His argument, however, proves too much. Stripped of redundancy of statement, his position is this: That to sustain jurisdiction of the United States Circuit court in a suit between aliens, it is only necessary to show that one of the aliens is a *resident* of one of our states.

If this position be sound, then it must logically follow that in a suit brought in this court by an alien, it is only necessary to aver that the defendant is resident and doing business in the state where served with process. If residence and the doing of business in a state is all that is necessary to constitute the citizenship contemplated by the constitution for jurisdictional purposes, then these facts only need be proved; and, of course, by the rule of good pleading, these facts alone need to be averred, since no more need ever be alleged than is required to be proved.

The fallacy of this position is apparent when we consider the repeated decisions of the Supreme court of the United States, that any *averment* of residence, etc., is wholly unavailing to sustain the jurisdiction of the federal tribunals. *Citizenship* must be averred and proved; and

inasmuch as citizenship and alienage are the things put in opposition in the constitution, the one necessarily excludes the other, and alienage and citizenship for jurisdictional purposes cannot co-exist in the one person. The rule is well fixed that this court has no jurisdiction to try the controversies of aliens.

It does not appear, however, from the evidence in this case, that the defendant, Mr. Memory, is in any sense whatever a citizen of the state; so that even the inferior "citizenship" which the counsel for the plaintiff would have the court believe sufficient to give jurisdiction, has not been established. Mr. Memory has been simply doing business temporarily between foreign cities and Chicago, and for that purpose stopping temporarily in Chicago, as also in the other places. The record shows no more than this. The defendant, Mr. Memory, testifies that he is not a citizen of the United States, and that he is a subject of Great Britain. This is not disputed; no evidence was introduced to show the contrary, although the plaintiff's counsel cross-examined defendant on the subject. The record shows that Memory, during his alleged residence, has been repeatedly abroad, so that he has not even had a *permanent residence* in this country. He was also abroad when this alleged contract was made. There is no evidence that he is a citizen of Illinois for any purpose whatever, or that he resides here except for the temporary purposes mentioned, which require him no more to be here than elsewhere, and which require him to pass back and forth much of his time. He is a foreign exporter, and the record shows incidentally that he was much of the time out of the United States, as well as shows directly and specifically that he is not a citizen of the United States, but a citizen and subject of Great Britain.

There is no evidence that Mr. Memory has been living in Illinois permanently with his family for many years, as the plaintiff's counsel intimates in his brief. While it appears in evidence that he has been abroad since his alleged residence in Illinois, there is no evidence that his family ever resided in Illinois, or that he had this as his permanent or habitual abode. Like all foreigners doing business between different countries he has been compelled to be here part of the time as also abroad part of the time. It does not appear from anything in the evidence that Mr. Memory has acquired a domicile in Illinois, or that he was a citizen of Illinois even in the sense or to the extent that a foreigner and alien can become a "citizen." A man flitting backward and forward as a trader between two or many nations is not a resident, much less a citizen of any or every one in which he thus happens in turn to be.

The facts testified to in regard to Mr. Memory's citizenship are simply that he is not a citizen of the United States, and that he is a citizen and subject of Great Britain. This was found by the court below, and being a matter of fact, will not be reviewed by this court, but is conclusive here. It was, moreover, not contradicted by any testimony whatever. Nothing in the cross-examination tended to impeach this testimony. It is a matter of fact about which any man of ordinary intelligence can adequately testify. It is no conclusion of law, as claimed in plaintiff's brief. Any man knows whether he has been naturalized, or whether he has done any of the numerous and well-defined acts which are required and absolutely necessary to constitute him a citizen. Mr. Memory testifies that he is not a citizen of the United States, but a citizen and subject of Great Britain. There

is no evidence that he is, or has been, a citizen of Illinois, even if that were possible during his foreign allegiance as a subject of Great Britain; and the court will not presume a residence here for any purpose.

The Supreme court of the United States has settled beyond dispute the insufficiency of any such "residence" to constitute citizenship or give jurisdiction.

In *Robertson* v. *Cease*, 97 U. S., 646, already cited, the Supreme court draws a distinction between residing in a state and being a citizen of a state, so as to confer jurisdiction on a Federal court. The claim of residence in that case was much stronger than in Mr. Memory's, and yet the "resident" was declared not to be a "citizen" of the stnte. The averment as to him in the pleadings was that he "resides in the county of Macon and State of Illinois"; and in his own testimony he said: "My name is Henry "Cease, residence Macon county, Illinois; age 52 years; "occupation, grain dealer and farmer."

The Court say, neverthless:

"We find nothing beyond the naked averment of "Cease's *residence* in Illinois, which, according to the uni- "form course of decisions in this court is insufficient to "show his *citizenship* in that state. Citizenship and resi- "dence, as often declared by this court, are not synony- "mous terms. *Parker* v. *Overman*, 18 How., 137. * * "* * In the oral argument before the court the in- "quiry arose whether since the adoption of the Fourteenth "amendment to the Federal constitution, the mere alle- "gation of the residence in Illinois did not make such a "*prima facie* case of citizenship in that state as in the "absence of proof should be deemed sufficient to sustain "the jurisdiction of the Circuit court. * * * Those

"who think the Fourteenth amendment requires some "modification of those rules, claim, not that the plaintiff's "residence in a particular state necessarily or conclusively "proves him to be a citizen of that state within the mean- "ing of the constitution, but that only a general allegation "of residence, without indicating the character of such resi- "dence, whether temporary or permanent, made a *prima* "*facie* case of right to sue in the Federal courts. As the "jurisdiction of the Circuit court is limited in the sense "that it has none except that conferred by the constitution "and laws of the United States, the presumption now, as "well as before the adoption of the Fourteenth amend- "ment, is, '*that a cause is without its jurisdiction* "*unless the contrary affirmatively appears.*' In cases "where jurisdiction depends upon the citizenship of "the parties, such citizenship, or the facts which in legal "intendment constitute it, should be directly and positively "averred in the pleadings, and they should appear affirma- "tively and with great distinctness in other parts of the "record. And so where jurisdiction depends on the alien- "age of one of the parties. * * * Here the only "fact averred, or appearing from the record, is, that Cease "was a resident of Illinois, and we are, in effect, asked, to "support the jurisdiction of the court below, to infer argu- "mentatively, from the mere allegation of 'residence'— "that if not an alien, *he had a fixed permanent domicile* "*in that state, and was a native or naturalized citizen* "*of the United States and subject to the jurisdiction thereof.* "We perceive nothing in either the language or policy of "the Fourteenth amendment, which requires or justifies "us in holding that the bare averment of the resi- "dence of the parties is sufficient *prima facie* to "show jurisdiction. The judgment must, therefore, be

" reversed, upon the ground that it does not affirmatively " appear from the record that the defendant in error was " entitled to sue in the Circuit court."

Whatever rights and privileges a state may confer on a foreigner, it cannot thereby make him a citizen of the state in the sense contemplated in the jurisdiction clause of the Federal constitution. This inability is clearly declared in *Dred Scott* v. *Sandford*, 19 How., 393. The court say:

" In discussing this question we must not confound the " rights of citizenship which a state may confer within its " own limits, and the rights of citizenship as a mem- " ber of the Union. * * * He may have all the " rights and privileges of the citizen of a state, and yet " not be entitled to the rights and privileges of a citizen in " any other state. * * * Each state may still confer " them (the rights and privileges) upon an *alien*, or any " one it thinks proper, or upon any class or description of " persons; *yet he would not be a citizen in the sense in* " *which that word is used in the constitution of the United* " *States, nor entitled to sue as such in one of its courts*, " nor to the privileges and immunities of a citizen in the " other states. The rights which he would acquire would " be restricted to the state which gave them. The con- " stitution has conferred on Congress the right to establish " a uniform rule of naturalization, and this right is evidently " exclusive, and has always been held by this court to be " so. Consequently no state since the adoption of the " constitution can, by naturalizing an alien, invest him with " the rights and privileges secured to a *citizen of a state* " under the Federal government, although so far as the " state alone was concerned he would undoubtedly be en- " titled to the rights of a citizen."

The court then proceed to say that since the constitution does not, when a state raises one to the rank of a "citizen," immediately clothe him with all the privileges of a citizen in every other state: "The plaintiff in error "could not be a citizen of the State of Missouri within the "meaning of the constitution of the United States, and "consequently was not entitled to sue in its courts."

The court goes even farther than this, and adds that even though one should be allowed to vote in a state, and have in every other respect complete citizenship, he yet would not be a citizen of the state in the sense of the constitution, if he were a foreigner, or had any other disability which it belongs to the Federal government alone to remove:

"A person may be entitled to vote by the law of the "state, who is not a citizen of the state itself. And in "some of the states of the union, foreigners not naturalized are allowed to vote. And the state may give the "right to free negroes and mulattos, but that does not "make them *citizens of the state*, and still less of the "United States. And the provision in the constitution, "giving privileges and immunities in the state, does not "apply to them."

While thus a state could not, if it would, make an alien a "citizen of the state," in the sense in which the Federal constitution uses those terms, it has not attempted to do so in the present case.

The State of Illinois never took any action, directly or indirectly, to confer rights of citizenship on the defendant, Mr. Memory, or to affect at all his condition. There are no laws in this state which seek to make a citizen out of an alien; none which attempt to confer such citizenship

upon him by reason of a residence without naturalization. All the rights which an alien resident has in Illinois are possessed by all others, whether resident or not, who are not citizens. They are the same as those of residents and citizens of other states. They can hold real estate, and are entitled to share in the distribution of an intestate's personal property (Revised Stat. Ill., Chap. 6, Secs. 1 and 2), but this they can do in no other way than a non-resident alien can. They have no rights as *resident* aliens. In short, there is in Illinois no citizenship for aliens—no statutory provision which gives them any special privileges because resident there. There is, in short, no provision whatever in the laws of Illinois for conferring citizenship in any degree whatever upon aliens.

Nor, let me add, would there be any occasion for it, or for conferring jurisdiction on the Federal courts in controversies between foreigners. In Illinois, as in the other states, such foreigners have adequate remedies in the State courts.

Negroes and Indians have been residents of our states from the beginning, but they are not citizens. After emancipation it was deemed necessary to amend the constitution (14th amendment) and to enact special laws to make the emancipated negroes citizens. Much less can a foreigner, who was neither born in the United States, nor naturalized, become, by mere residence, a citizen.

There are no federal provisions for recognizing a foreigner as a citizen of a state. No conditions are prescribed or recognized by Congress as adequate in any state for such state naturalization. There are no precedents determining when a foreigner ceases to be what he was before and becomes a citizen of the state. There

is no regulation as to what time he must reside in a state, or whether he intends to remain, or whether he intends to abandon his allegiance to a foreign government. Neither the state laws nor our national laws contemplate making a citizen out of an alien except by naturalization, and that is done exclusively by federal authority, and by making him at the same time a citizen of the United States. Then he becomes *ipso facto* a citizen also of the state in which he resides. State citizenship follows national citizenship; and one's national citizenship being established, the change of citizenship spoken of in plaintiff's brief from one state to another becomes easy. But before that time it remains impossible. The state has no power of naturalization.

Section 2 of article IV. of the constitution, reads: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." If, now, one state could make a citizen out of a foreigner by mere residence, and without naturalization, so that he should thereafter be a citizen of that state, such "citizen "of the state" would acquire, on going to any other state, all the rights of a citizen of the new state into which he should go. That is, one state could make citizens of another state, and of all the states, and so virtually nullify the naturalization laws of Congress.

A state, accordingly, cannot of itself make a citizen of the state in the sense contemplated by the constitution, which would be equivalent to making one a citizen of the United States. A state could at most only make a citizen of a state as to its local and state privileges. It could not give him any federal rights while a foreigner. This is the main proposition directly settled in the Dred Scott case.

The standing of a foreigner in the United States courts must necesearily be regulated by the laws of the United States, and cannot be modified by the action of any state, or by the action of any individual in a state.

As between citizens of the United States residing in different states, the term citizenship, spoken of in the constitution in reference to the jurisdiction of the Federal courts, means of course nothing more than residence, as claimed in plaintiff's brief. But as between foreigners, or where one is a foreigner, it is radically different, and for the reasons given.

A citizen of the United States, residing in any state of the Union, is a citizen of that state. (*Gassies* v. *Ballou*, 6 Pet., 761.) This is the reason why mere residence by an American citizen in a state is sufficient to confer jurisdiction. The same is not true, however, of a foreigner. Before he can obtain this status he must be naturalized.

A foreigner cannot give himself citizenship any more than he can give a court jurisdiction. The statutes of the United States confer both.

An alien may sue in the Circuit court, though a resident of the same state as the citizen defendant. (*Breedlove* v. *Nicolet*, 7 Pet., 431.) This being so, it necessarily follows that residence does not confer citizenship in the sense required in order to sue another alien. He is regarded as still an alien; for to give jurisdiction to the Circuit court one of the parties must be an alien. If he were deemed a citizen of the state the suit entertained by the Circuit court would be between two citizens of the same state, which is not permissible.

Pascal's Annotated Constitution, in enumerating the

different persons who may be citizens under the terms, "the "citizens of each state," in constitution, Art. IV, Sec. 2, mentions no foreigners, but includes among those once foreigners only the following: "All persons naturalized according to uniform rule." (Page 224.)

As to the long argument of counsel for plaintiff in error, intended to show that one can acquire a national citizenship by mere residence, and so a state citizenship, it may be enough to state that this court has repeatedly held, and nothing is more unalterably settled, than that national citizenship can, in this country, be conferred on foreigners only by naturalization, and that a state cannot confer such citizenship.

The quotations from Kent and others in plaintiff's brief (pages 13, 14), tending to show that by the law of nations one acquires by mere residence a "national citizenship," and becomes a subject of the nation in which he resides, were written in contemplation of special rights of merchants (as whether, for example, their property is liable to capture in time of war), and they by no means intimate that such residence for commercial purposes gives the citizenship contemplated in our constitution. This court has repeatedly held that one can, in this nation, be made a citizen only by naturalization; so that mere residence has no effect whatever to make him a national subject. While residence of course makes him subject to the nation, and to the state in certain respects, just as it makes an American, when travelling abroad, subject to the foreign government in whose territory he is found, the law of nations referred to contemplates nothing more in any case.

Kent, himself, says (2 Com., 70): "These privileges

"conferred upon aliens by state authority, are dictated "by a just and liberal policy; but they must be taken to "be strictly local, and until a foreigner is duly naturalized, "according to the act of Congress, he is not entitled in "any other state to any other privilege than those which "the laws of that state allow to aliens. No other state "is bound to admit, *nor would the United States admit*, "an alien to any privilege to which he is not entitled by "treaty, or the laws of nations, or the laws of the United "States, or of the state in which he dwells. The article "of the constitution of the United States declaring that "*citizens of each state* were entitled to all the privileges "and immunities of citizens in the several states, *applies* "*only to natural born or duly naturalized citizens.*"

In other words, the constitutional expression, "*citizen of* "*a state*," is here defined to mean one who while a citizen of the state is also a citizen of the United States—either "natural born or duly naturalized."

No national character accordingly can, in America, be obtained by a foreigner except by naturalization. The inferior "national character" for commercial purposes referred to by plaintiff's counsel and supported on The Venus, 8 Cranch., 253, is very far from *citizenship*. The court thus speaks of it in this very case:

"But this national character which a man acquires by "residence may be thrown off at pleasure by a return to "his native country, or even by turning his back on the "country in which he has resided on his way to another. "To use the language of Sir W. Scott, it is an adventi-"tious character gained by residence, and which ceases "by non-residence." (Page 280.)

And Chief Justice MARSHALL, in commenting on this case, says (8 Cr., 290):

"A domicile then, in the sense in which this term is "used by Vattel, requires not only actual residence in a "foreign country, but an intention of always remaining "there. Actual residence without this intention amounts "to no more than simple habitation. * * * Mere resi- "dence, under particular circumstances, would seem to "me, at most, to prove only an intention to remain so long "as those circumstances continue the same, or equally "advantageous. This does not give a domicile. The in- "tention which gives a domicile is an unconditional inten- "tion to stay always. * * * The subject of one power "inhabiting the country of another, ought not to be con- "sidered as a member of the nation in which he resides, "even by foreigners. * * * I think I cannot be mistaken "when I say that in all the views taken of the subject by "the most approved writers on the law of nations, the "citizen of one country residing in another is not con- "sidered as incorporated in that other, but is still con- "sidered as belonging to that society of which he was "originally a member. * * * The policy of commercial "nations receives foreign merchants into their bosom, and "permits their own citizens to reside abroad for the pur- "poses of trade without injury to their rights or character "as citizens."

It is claimed in the argument of plaintiff in error that since a corporation organized and doing business in a state has been deemed a citizen of that state for purposes of conferring jurisdiction, therefore, a foreign individual man, *i. e.*, an alien, is such citizen. I do not see the force or applicacy of the argument. The status of a corporation in this respect has never been accurately determined. But even if a domestic corporation could be such a citizen, a

domestic corporation differs from a foreign citizen and subject (like Mr. Memory) in many ways. It has no foreign citizenship. It is not in any sense an alien. It owes no allegiance to any foreign government. All there is of it is American, and belongs to the state in which it is. Our government (national and state) has complete control over it. The only "citizenship" it has is American citizenship and state citizenship. Its domestic citizenship exhausts all the citizenship of which it is capable, and all the rights, privileges and immunities which a corporation can have. There is no ground for comparison with a foreign man or woman (who has another citizenship.) Neither the State of Illinois nor the United States has any control over Mr. Memory as a citizen. It protects him while traveling or trading in the country, as it protects any other foreign traveler or temporary resident, and as a foreign government protects any American while in its territory; and he is amenable to our laws only as our citizens are to those of foreign countries when temporarily residing there. An alien's rights and obligations when here are not all determined by this country. The government to which he owes allegiance determines many of them. He has a distinct character as an alien, apart from what he is as a resident of one of our states. This a corporation does not have. There is thus a vast difference, and there are many differences, between a domestic corporation as a resident of Illinois, and a British subject as a resident of Illinois. There are many reasons why a domestic corporation should be considered a citizen (for purposes of giving jurisdiction) of the state in which he is found, just as there are why a foreign corporation is considered an alien for this purpose.

Society for the Propagation of the Gospel v. Town of New Haven, 18 Wh., 464.

But these reasons do not in the least imply or indicate that a foreign *man* should be considered a citizen of Illinois for this purpose. A foreign corporation doing business in Illinois, even if it have an office in the state, is not a citizen. *A fortiori*, a foreign man is not a citizen.

Even if it could be true that Memory is a citizen of Illinois, yet, because he is, like the plaintiff, an alien, the United States court would not have jurisdiction. In *Montalet* v. *Murray*, 4 Cr., 46, "the court was unani-"mously of the opinion that the courts of the United "States had no jurisdiction of cases between aliens." The Supreme court of the United States has, therefore, decided not only that where one party is an alien the other must be a citizen of a state, but also that the latter *must not be an alien*. The United States courts have no jurisdiction of suits *between aliens*, even if one of them be a citizen of a state (if that were possible).

In *Hauenstein* v. *Lynham*, 100 U. S., 483, where one lived and acquired his property in a state, but was not naturalized—a case of "citizenship" certainly as strong as Mr. Memory's is alleged to be—this court say:

"There is no proof that he denationalized himself, or "ceased to be a citizen and subject of Switzerland. His "original citizenship is, therefore, to be presumed to "have continued. (Best on Presumptions, 186.) Accord-"ing to the record, *his domicile, not his citizenship, was* "*changed*."

It is not a fact, as claimed in plaintiff's brief, that women, idiots and children, who have not full political rights, but yet are citizens, have no more rights than foreigners have who reside here. They have rights here and abroad, as Americans, which aliens have not; and

aliens have rights which they have not. An alien can effectually invoke the protection of the government of which he is a subject, which an American woman cannot do. She can invoke in such way the protection of our own government, which an alien cannot do.

Plaintiff's counsel also claims that the defendant had power to *elect* whether he should he considered a citizen for purposes of conferring jurisdiction; that is, that it rests with himself to give jurisdiction to the United States courts. Though an alien, it is claimed he can, for the purposes of having his causes determined in the Federal courts, make himself a citizen by his own act, or even without any act, by his own inaction. Citizenship in this view depends on one's will, and on such will even when not exercised. This position hardly justifies a serious answer.

This court has repeatedly held that the parties cannot *by consent even*, give the courts of the United States jurisdiction.

Pacific R. R. Co. of Mo. v. *Geo. H. Ketchum et al.*, 101 U. S. Rep., 932.

Much less can one of the parties, by himself, give such jurisdiction, least of all, by accident or mere silence.

It thus appears most abundantly and conclusively from all the authorities, and without any contradiction among them, that one can be a citizen of a state in the sense in which that term is used in the constitution, only by being a citizen and subject of the United States, or, as expressed by Justice SWAYNE (16 Wall., 126): "A citizen of a "state is, *ipso facto*, a citizen of the United States. No "one can be the former without being also the latter"; or, as expressed by Justice BRADY, already quoted (16

Wall., 112) "The question is well settled by the four-
"teenth amendment itself, that citizenship of the United
"States is the primary citizenship of this country; and that
"state citizenship is secondary and derivative, depending
"upon citizenship of the United States and the citizen's
"place of residence." Or, as expressed by Justice FIELD, (16 Wall., 95): "A citizen of a state is now only a "citizen of the United States residing in that state."

III.

OBJECTION TO THE JURISDICTION CAN BE RAISED AT ANY TIME.

I deem it unnecessary to make any extended argument to show that the objection to the jurisdiction of the Circuit court can be raised at any time. The statute of March 3, 1875, Chap. 137, Sec. 5, (1 Sup. Revised Stat. U. S., p. 175), clearly and unmistakably settles this: "If it shall appear to the satisfaction of said Circuit court "*at any time after suit has been brought* * * that such "suit does not really and substantially involve a dispute "or controversy properly within the jurisdiction of said "Circuit court, * * the said Circuit court shall pro-"ceed no further therein, but shall dismiss the suit."

These terms are without limit or qualification "at *any* "time after such suit has been brought,"—after summons, after pleading, after trial, after verdict, or upon appeal—"at *any* time." Whatever may have been the disability of a party before the passage of the statute of 1875, to raise the objection after pleading to the merits, such disability was by that statute removed. The express words

of the statute authorize this objection to be raised whenever either party or the court sees fit. The court is to be allowed no jurisdiction where it has none. The parties cannot confer jurisdiction where it does not exist. The statute is mandatory, and inexorably requires that "the "said Circuit court *shall proceed no further therein, but* "*shall dismiss the suit.*" It leaves no option to the court to cut off the time in which the objection may be raised, or to dispose of the case otherwise than by dismissal, or remanding it when removed from another court. There is here no ambiguity, or occasion for the exercise of subtlety of interpretation. The only words indicating the time within which the case must be dismissed, are "at "any time after such suit has been brought."

This language of the statute accordingly precludes all supposition that the objection must be raised at any particular time or in any particular way. It makes no distinction between raising the objection by pleading, upon motion, or otherwise. All that is necessary is that "it appear to the "satisfaction of said Circuit court at any time after such "suit has been brought," that it has no jurisdiction. The court can itself raise the question, and must do so if the evidence justifies it: "The said Circuit court shall pro- "ceed no further therein, but shall dismiss the suit." All that is necessary is that the want of jurisdiction appear, which may be at any time, and the court must then proceed no further, but dismiss. The plain terms of the statute inhibit all procedure by the court where it has no jurisdiction, no matter when or how that fact be made to appear.

There are other cases where the court must also dismiss, as when parties are collusively joined; but these cases do not limit or affect the provision that *whenever*,

for any cause whatever, it appears that there is no jurisdiction, the court shall proceed no farther. The counsel for plaintiff argues that there was no collusion or fraud by which the suit at bar was begun in the Circuit court. But that, if true, is immaterial. If for any reason, or with the best intentions, a suit is commenced in a court which has no jurisdiction, it must be dismissed. The statute of 1875, section 5, does not distinguish between the obligation of the court to dismiss when the court has no jurisdiction and when it obtains *prima facie* jurisdiction by collusion. In either case it must proceed no further. The statute provides for peremptory dismissal in case either the suit does not involve a dispute or controversy within its jurisdiction, or in case the parties are collusively joined; and the provision is the same in both cases, namely, that this may be made to appear and be acted upon at any time.

We are not dependent, however, upon the statute alone, clear and satisfactory as it is, for this view; but the Supreme court has settled this question beyond dispute in interpreting the statute of 1875. We cite briefly the following cases:

In *Williams* v. *Nottawa*, 104 U. S., 209, the court say: "Whatever may have been the practice in this particular "(objecting to jurisdiction in abatement) under the act of "1789, there can be no doubt what it should be under "that of 1875, * * Congress * * imposed the duty "on the court, on its own motion, without waiting for the "parties, to stop all further proceedings and dismiss the "suit the moment anything of the kind appeared" (that it had no jurisdiction). "Inasmuch, however, as it was the "duty of the Circuit court, on its own motion, as soon as "the evidence was in and the collusive character of the case

"shown, to stop all further proceedings and dismiss the "suit, the judgment is reversed, and the case remanded "with instructions to dismiss the suit at the cost of the "plaintiff in error, because it did not really and sub- "stantially involve a dispute or controversy within the "jurisdiction of that court."

This was a case where the parties were collusively joined; but the reasoning shows that in any case where the court has no jurisdiction, the court may and must dismiss when that fact appears, even after pleading to the merits, and when no objection has been taken to the jurisdiction by plea in abatement. The decision interprets this as the meaning of the 5th section of the act of 1875.

This has been further adjudged and put beyond doubt in the subsequent cases, which I next cite.

In *Farmingham* v. *Pillsbury*, 114 U. S. Reports, 138, this court say that it is the duty of the Circuit court at any time on its own motion, and without waiting for the parties, to stop all further proceedings, and that it must do this not only when there has been a fraud committed on the court, to give it jurisdiction, but also when, for any reason whatever, the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction. For these purposes the court say: "it was made "the duty of a court, at any time when it satisfactorily ap- "peared that a suit did not substantially involve a dispute or "controversy properly within its jurisdiction, or that the "parties had been improperly or collusively made or "joined, * * for the purpose of creating a case cog- "nizable under that act, to proceed no further therein, "but to dismiss the suit or remand it to the state "court from which it had been removed. This, as

"was said in *Williams* v. *Nottawa*, 104 U. S., 209, "211, imposed the duty on the court, on its motion, "without waiting for the parties, to stop all further pro- "ceedings and dismiss the suit the moment a fraud in its "jurisdiction was discovered. *The old rule established by* "*the decisions which required all objections to citizenship of* "*the parties, unless shown on the face of the record, to be* "*taken by plea in abatement before pleading to the merits,* "*was changed*, and the courts were given full authority to "protect themselves against the false pretenses of the ap- "parent parties. That is a salutary provision which ought "not to be neglected. It was intended to promote the ends "of justice, and is equivalent to an express enactment of "Congress, that the Circuit courts shall not have jurisdic- "tion of writs which do not really and substantially involve "a dispute or controversy of which they have cognizance, "nor of suits in which the parties have been improperly or "collusively made or joined for the purpose of creating a "case cognizable under the act."

Observe that there are here two distinct matters which require that the courts shall at once dismiss the case, and proceed no further (1) when "the suits do not really and "substantially involve a dispute or controversy of which "they have cognizance," and (2) when they are "suits in "which the parties have been improperly or collusively "made or joined for the purpose of creating a case cog- "nizable under the act." In *either* case the Circuit court has no jurisdiction, and must therefore dismiss the suit.

This settles the doctrine, that in all cases where the suit does not involve a dispute or controversy properly within the jurisdiction of the Circuit court, objection may be raised at any time, and the court must proceed no further, but dismiss the suit.

In *Rae* v. *Grand Trunk Ry. Co.* (Cir. Ct. E. D. Mich.) 14 Federal Reporter, 401, the court say:

"That this court has no jurisdiction of controversies "between aliens either nnder the judiciary act of 1789 or "the act of 1875 is admitted. * * * Section 5 (of the "act of 1875) vests these courts with a summary power "to stop proceedings and dismiss a suit whenever it shall "appear that it does not really and substantially involve a "dispute or controversy properly within its jurisdiction, " * * * The salutary nature of this provision is not "open to question. * * * *While it has been the prac-* "*tice in this district, ever since the act of 1875, to plead* "*the want of proper citizenship in abatement, it is clear* "*from the opinion of the Supreme court in Williams* v. "*Nottawa, 104 U. S., 209, that this is no longer necessary,* "*and that it is the duty of the court, of its own motion, to* "*dismiss the suit the moment the want of jurisdiction is* "*made evident.* * * * As it is not disputed in this "case that both parties are aliens, the suit must be dis-"missed."

See also, *Lanz* v. *Randall*, 4 Dil., 425.

In *Börs* v. *Preston*, 111 U. S., 252, where a foreign consul was a party, and the want of jurisdiction of the court was not plead, the Supreme court say:

"To this it is sufficient to reply that this court must, "from its own inspection of the record, determine whether "a suit against a person holding a position of consul of a "foreign government is excluded from the jurisdiction of "the Circuit courts. In cases of which the Circuit courts may take cognizance only by reason of the citizenship of "the parties, this court, as its decisions indicate, has, ex-"cept under special circumstances, declined to express any

"opinion upon the merits on appeal or writ of error, "where the record does not affirmatively show jurisdic- "tion in the court below; this because the courts of the "Union, being courts of limited jurisdiction, the presump- "tion in every stage of the cause is, that it is without "this jurisdiction unless the contrary appear from the "record. *Grace* v. *American Insurance Co.*, 109 U. S., "278, 283; *Robertson* v. *Cease*, 97 U. S., 646. Much "more, therefore, will we refuse to determine on the mer- "its, and will reverse on the point of jurisdiction, cases "where the record shows affirmatively that they are of "a class which the statute excludes altogether from the "cognizance of Circuit courts. If this were not so it "would be in the power of the parties by negligence or "design to invest those courts with a jurisdiction expressly "denied to them."

In *Mansfield, Coldwater and Lake Michigan Railway Company et al.* v. *Swan et al.*, 111 U. S. 379, this court put the matter beyond all question in these words:

"*The rule springing from the nature and limits of the "judicial power of the United States is inflexible and with- "out exception, which requires this court, of its own motion, "to deny its own jurisdiction, and, in the exercise of its ap- "pellate power, that of all other courts of the United States "in all cases where such jurisdiction does not affirmatively "appear in the record, on which, in the exercise of that "power, it is called to act. On every writ of error or ap- "peal the first and fundamental question is that of jurisdic- "tion, first of this court, and then of the court from which "the record comes. This question the court is bound to ask "and answer for itself, even when not otherwise suggested, "and without respect to the relation of the parties to it. * * "The course of the court is, where no motion is made by*

"*either party, on its own motion, to reverse such a motion for* "*want of jurisdiction, not only in cases where it is shown* "*negatively by a plea to the jurisdiction, that jurisdiction* "*does not exist, but even when it does not appear affirmatively* "*that it does exist. Pequignot* v. *The Pennsylvania R. R.* "*Co.*, 16 How., 104. It acts upon the principle that *the* "*judicial power of the United States must not be exerted in* "*a case to which it does not extend, even if both parties desire* "*to have it exerted. Cutler* v. *Rae*, 7 How., 729. * * * "And in *Williams* v. *Nottawa*, 104 U. S., 209, it was held "to be the duty of the Circuit court to execute the provis- "ions of the 5th section of the act of March 3, 1865, Ch. "137, 18 Stat., pt. 3, p. 470, by dismissing a suit *of its own* "*motion* whenever it appeared that it did not really and sub- "stantially involve a dispute or controversy properly within "its jurisdiction, and equally so of this court when on error "or appeal it appeared that the Circuit court had failed to "do so, in a proper case, to reverse its judgment or decree "for that reason, and to remand the cause with direction "to dismiss the suit."

IV.

THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO REVIEW THE ORDER OF DISMISSAL.

This case is not reviewable by the Supreme court because the matter in dispute does not exceed the sum or value of $5,000.

Section 3 of Act of February 16, 1885, 1 Supplement, Rev. Stat., U. S. 136, reads:

"Whenever by the laws now in force it is required that "the matter in dispute shall exceed the sum or value of

"$2,000, exclusive of costs, in order that the judgment and "decrees of the Circuit court of the United States may be "re-examined in the Supreme court, such judgment and "decrees hereafter rendered shall not be re-examined in the "Supreme court unless the matter in dispute shall exceed "the sum or value of $5,000, exlusive of costs."

"The laws now in force," referred to in the foregoing paragraph, are sections 691 and 692 of Revised Statutes United States, which determine the jurisdiction of the Supreme court in this regard. In all these provisions the amount in dispute must exceed $2,000.

The only exceptions are those enumerated in Revised Statutes, section 699, none of which embrace the present case.

There is no provision prior to the statute of March 3, 1875 (1 Sup. Revised Statutes, 175), authorizing the Supreme court to review an order or judgment of the Circuit court, because the question of jurisdiction was involved.

Nor does this last statute so provide. It provides merely that the Supreme court may review the orders of the Circuit court on writ of error or appeal (presumably when the value exceeds $5,000). There is no provision that an order dismissing a case which does not involve over $5,000 may be thus reviewed. This large class of cases (all that are dismissed for want of jurisdiction, no matter what the amount involved) would not have been added to the jurisdiction of the Supreme court without a word as to conveying this power irrespective of the amount in controversy. The statute of March 3, 1875, section 5, was not meant to extend the jurisdiction of the Supreme court to smaller amounts, but only to cases within the

legal amount (over $5,000), where they are dismissed for lack of jurisdiction. (See *Whitsitt* v. *Railroad Co.*, 103 U. S., 770, quoted below.)

Section 5, taken as a whole, provides simply that whenever it appears that the Circuit court has no jurisdiction it shall dismiss the case, but that this dismissal shall not be final, but subject to the same appeal which is allowed in other cases; that is, that the Supreme court may review the order. But for this the controversy must be within the amount upon which the Supreme court may act.

In general this court has often held that to give jurisdiction to the Supreme court in error, the matter in dispute must exceed the amount (formerly $2,000, now $5,000), which gives the Supreme court jurisdiction. If it but equal that sum there is no jurisdiction.

Walker v. *United States*, 4 Wall, 163.

In *Whitsitt* v. *Railroad Co.*, 103 U. S., 770, this court rendered the following opinion, which I quote in full:

"Although the act of March 3, 1875, chapter 137 (18 "Statutes, part 3, page 470) gave the Circuit courts of the "United States original cognizance of suits of a civil "nature, arising under the constitution and laws of the "United States, where the matter in dispute exceeds, ex- "clusive of costs, the sum or value of $500, *it did not* "*change our jurisdiction for the review of the judgments* "*and decrees* of *those courts. That depends now, as it did* "*before, on the value of the matter in dispute, which must* "*exceed $5,000.* This record does not show in express "terms or by fair implication that the value of the prop- "erty in controversy reaches that sum. Appeal dismissed "for want of jurisdiction."